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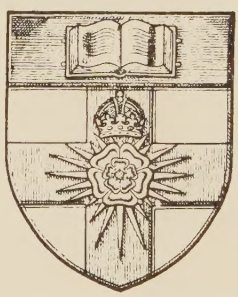

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AND THE

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PRIVY COUNCIL.

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ERRATA.

Page 59, line 8 from top, *for* "*Hen* v. *Gibb*," *read* "*Hext* v. *Gill*."
„ 59, note (4), *for* "30 L. J. (Q.B.)," *read* "30 L. J. (Ch.)."
„ 59, note (11), *for* "Law Rep. 2 Ch.," *read* "Law Rep. 7 Ch."
„ 175, line 9 from top, *for* "Sir Robert P. Collier," *read* "Sir Montague E. Smith."
„ 190, note (1), *for* "6 Q. B. 1," *read* "Law Rep. 6 Q. B. 1."
„ 239, line 16 from bottom, *for* "Sir Barnes Peacock," *read* "The Lord Chancellor (Lord *Selborne*)."
„ 305, line 16 from bottom, *for* "Sir Montague E. Smith," *read* "The Lord Justice Mellish."
„ 317, last line, *for* "*Bougainville*," *read* "*James C. Stevenson*."
„ 404, note (5), *for* "30 L. J. (Ex.) 317," *read* "30 L. J. (Ex.) 337."
„ 410, note (6) *for* "30 L. J. (Ex.) 317," *read* "30 L. J. (Ex.) 337."
„ 492, note (3), *for* "Law Rep. 4 C. P.," *read* "Law Rep. 4 P. C."
„ 508, note (1), *for* "13 Ves. 114," *read* "In *Hiern* v. *Mill*, 13 Ves. 119."

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Appeal Cases

BEFORE THE

JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

HENRY PRINCE AND WILLIAM ANDERSON OGG . . . . . } APPELLANTS;

AND

OUR SOVEREIGN LADY THE QUEEN AND WILLIAM AUGUSTINE DUNCAN, COLLECTOR OF HER MAJESTY'S CUSTOMS . . } RESPONDENTS.

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1873
Dec. 2, 3.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF NEW SOUTH WALES.

New South Wales Customs Acts, Construction of—Omission in Bill of Entry—Forfeiture.

The *Customs Regulation Act*, of 1845, of the Colony of *New South Wales* enacts that the person entering any goods shall deliver to the collector a bill of the entry thereof expressing the particulars of the quantity and quality of goods, and the packages containing the same, &c., and that the collector shall grant his warrant for the unlading of such goods; and that no entry shall be deemed valid unless the particulars of the goods and packages in such entry shall correspond with the report of the ship, and any goods taken or delivered out of any ship by virtue of any entry or warrant not corresponding or

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* *Present:*—SIR JAMES W. COLVILE, SIR ROBERT JOSEPH PHILLIMORE, JUDGE OF THE HIGH COURT OF ADMIRALTY, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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agreeing as therein mentioned, or not properly describing the same, shall be deemed to be goods landed or taken without due entry thereof, and shall be forfeited.

The *Customs Duties Act* of 1871, which relates to *ad valorem* duties only, provides for the verification of the value at the time of entry by the production of the genuine invoice, and by a declaration in a prescribed form.

A. & B., merchants, carrying on business together in *Sydney*, imported several cases which contained soft goods, and also contained portmanteaus, wherein soft goods were packed. The agent of *A. & Co.* filed and delivered a bill of entry of the cases, and made the required declaration in verification, and produced the invoice of the soft goods, but in respect of the portmanteaus and hat-boxes he made no entry and filed no invoice:—

It was *held* by the Judicial Committee that by the omission in the entry of the portmanteaus and hat-boxes contained in some of the cases, the whole of the contents of such cases were forfeited, the entry of the goods being invalid. No entry can cover less than one entire package.

THIS was an appeal from a decree of the Vice-Admiralty Court of *New South Wales*, bearing date the 23rd of July, 1872, made upon an information or libel by Her Majesty and the Respondent *William Augustine Duncan*, collector of customs of the port of *Sydney, New South Wales*, stating the grounds of seizure of two cases of merchandise and praying their condemnation.

The Appellants were merchants trading together in *Sydney* under the style of *Prince, Ogg, & Co.*

The question in the present appeal arose with respect to certain cases of merchandise imported by the Appellants into the colony of *New South Wales*, from *London*, by the ship *Damascus*, which arrived in the port of *Sydney* on the 28th of June, 1871.

The Appellants had purchased of *Weintraud, Joyce, & Co.*, a *London* firm, a quantity of trimmings and other small wares. They also had purchased of *J. Lyons & Son*, also *London* merchants, certain trunks and hat-boxes. According to a custom of the trade, the trunks and boxes had been forwarded in the same cases with the trimmings and small goods, the latter being packed up in the trunks and boxes with the view of saving space and freight.

Out of ten cases received by the Appellants by the *Damascus* from the said firm of *Weintraud, Joyce, & Co.*, five contained trimmings and small goods, packed in this way, in trunks and hat-boxes. Separate invoices were sent in respect of the two

classes of goods, the invoice from Messrs. *Lyons & Son* including the trunks and boxes, the invoice from Messrs. *Weintraud, Joyce, & Co.* containing the trimmings and small goods, and also containing a description of the trunks and boxes sent by *Joyce & Co.*, but not mentioning their price.

On the 8th of July, 1871, the whole of the ten cases from *Weintraud, Joyce, & Co.* were entered for payment of *ad valorem* duty at the *Sydney* Custom-house.

The laws of the colony of *New South Wales*, regulating the procedure at the Custom-house and the payment of duty on the goods imported in the cases, which were the subject of this appeal, were the *Customs Regulation Act*, 1845, and the *Customs Duties Act*, 1871.

The material parts of the *Customs Regulation Act* of 1845 are sects. 16, 18, and 22, which are as follows:—

(*As to Entries in general.*)

"16. And be it enacted, that the person entering any goods shall deliver to the collector or other proper officer a bill of the entry thereof, fairly written in words at length, expressing the name of the importer and of the ship, and of the master of the ship in which the goods are imported, and of the place whence they were brought, and of the place within the port where the goods are to be unladen, and the particulars of the quantity and quality of the goods and the packages containing the same, and the marks and numbers on the packages, and two or more duplicates, as the case may require, of such bill, in which all sums and numbers may be expressed in figures, and the particulars contained in such bills shall be written and arranged in such form and manner, and the number of such duplicates shall be such as the collector or other principal officer or other proper person shall require, and such person shall at the same time pay down all the duties due upon the goods, and the collector or other proper officer shall thereupon grant his warrant for the unlading of such goods."

"18. And be it enacted, that no entry nor any warrant for the landing of any goods, or for the taking of any goods out of any warehouse, shall be deemed valid unless the particulars of the

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goods and packages in such entry shall correspond with the particulars of the goods and packages purporting to be the same in the report of the ship or in the certificate or other document, where any is required, by which the importation or entry of such goods is authorized, nor unless the goods shall have been properly described in such entry by the denominations and with the characters and circumstances according to which such goods are charged with duty or may be imported, and any goods taken or delivered out of any ship, or out of any warehouse, by virtue of any entry or warrant not corresponding or agreeing in all such respects, or not properly describing the same, shall be deemed to be goods landed or taken without due entry thereof, and shall be forfeited."

(*As to ad valorem Duties*).

"22. And be it enacted, that in all cases where the duties imposed upon the importation of articles into the said colony are charged, not according to weight, tale, gauge, or measure, but according to the value thereof, such value shall be ascertained by the declaration of the importer of such articles, or his known agent, in manner and form following, that is to say:

'I, *A. B.*, do hereby declare that the articles mentioned in the entry and contained in the packages [*here specifying the several packages, and describing the several marks and numbers, as the case may be*] are of the value of .

'Witness my hand, this day of ,

'*A. B.*

'The above declaration, signed the day of , in the presence of '*C. D.*,

Collector [*or other principal officer*];'

which declaration shall be written on the bill of entry of such articles, and shall be subscribed with the hand of the importer thereof, or his known agent, in the presence of the collector or other principal officer of the customs at the port of importation: Provided that, if upon view and examination of such articles by the proper officer of the customs, it shall appear to him that the said articles are not valued according to the true price and value thereof, and according to the true intent

and meaning of this Act, then and in such case the importer or his known agent shall be required to declare on oath before the collector or other principal officer of customs what is the invoice price of such articles, and that he verily believes such invoice price is the current value of the articles at the place from whence the said articles were imported; and such invoice price, with the addition of ten pounds per centum thereon, shall be deemed to be the value of the articles in lieu of the value so declared by the importer or known agent, and upon which the duties due thereon shall be charged and paid: Provided also, that if it shall appear to the collector or other proper officer that such articles have been found invoiced below the real and true value thereof at the place from whence the same were imported, or if the invoice price is not known, the articles shall in such case be re-examined by two competent persons, to be nominated and appointed by the governor of the said colony, and such persons shall declare on oath before the collector or other proper officer, what is the true and real value of such articles at the port of importation in the said colony, and the value so declared on the oaths of such persons shall be deemed to be the true and real value of such articles, and upon which the duties due thereon shall be charged and paid."

The material parts of the *Customs Duties Act* of 1871 (which relates to *ad valorem* duties only) are sects. 8, 12, and 13:—

"8. In all cases in which goods shall, after the passing of this Act, continue to be chargeable with a duty *ad valorem*, or according to the true and real value of such goods, such value shall be verified at the time of entry by the production of the genuine invoice, and by the declaration in the form hereinafter prescribed of the importer of such goods, or (with the consent of the collector or other proper officer of customs) of his authorized agent:

'Port of

'I, *A. B.*, do hereby declare that the invoice now produced is the genuine and only invoice of the goods mentioned in the entry and contained in the packages [*here specify the several packages, and describe the several marks and numbers, as the case may be*], and that the value of such goods mentioned in the said invoice, and therein stated as [*here state value*] was, to the best of my

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belief, the fair market value of such goods at the time of shipment at the place whence the same were exported.

'Witness my hand, this day of one thousand, eight hundred, and '*A. B.*

'Declared before me day of

'(Signed) *E. D.*,

'Collector [*or other proper officer*].'

And such declaration shall be made by the importer or his authorized agent, as aforesaid, in the presence of the collector of customs, or other proper officer, and the invoice value so declared shall, with the addition of ten pounds per centum thereon, be deemed to be the value of the goods upon which duty shall be paid. And any person who shall in any such declaration make any false statement, knowing the same to be false, shall be guilty of a misdemeanour, and shall be liable and subject to the like penalties as in case of perjury."

"12. If upon examination it shall appear to the collector that the value of the goods mentioned in any declaration made under the 8th section of this Act has been incorrectly stated in such declaration, it shall be lawful for the said collector, in lieu of any other proceeding authorized by this Act, but subject to the approval of the Colonial Treasurer, to cause such goods to be detained and secured and (within five days from the landing thereof) to take such goods for the use of the Crown, and the said collector shall thereupon in such case cause the amount of the invoice value stated in such declaration, together with an addition of £10 per centum thereon, and also the duties (if any) paid upon such entry, to be paid to the importer or owner of such goods in full satisfaction for the same, and shall dispose of such goods for the benefit of the Crown, and the proceeds of such sale shall be paid into the Consolidated Revenue Fund: Provided, however, that the said collector, if he shall see fit, may permit such importer or owner, on his application for that purpose, to amend such entry at such value and on such terms as he the said collector may direct.

"13. If in any invoice or entry any goods entered for *ad valorem* duty have been fraudulently misdescribed with intent to avoid the

payment of the duty or any part of the duty on such goods, or if the oath or declaration made with regard to any such invoice or entry is wilfully false in any particular, the goods so misdescribed, or in respect of which such oath or declaration is wilfully false as aforesaid, shall be forfeited."

On the entry of the ten cases in question at the Custom-house the following declaration was made by *Robert Adams*, agent of the Appellants' firm:—

Post 20

"Imports, *Sydney*, 8th day of July, 1871.

"In the *Damascus*, a British ship, *Ross*, Master, from *London*.

"*Prince, Ogg, & Co.*

"Per *Ford, Adams, & Co.*, Agents,

"Port of *Sydney*.

"I, *Robert Adams*, agent of *Prince, Ogg, & Co.*, do hereby declare that the invoice now produced is the genuine and only invoice of the goods mentioned in the entry and contained in the packages.

"Marks and Nos.			Value. £	s.	d.	Duty.
	3,587.	One case Albums	30	3	6	
	3,588.	„ „	35	13	0	
P. O. & Co.	3,589.	„ Trimmings	42	11	5	
	3,590.	„ „	103	1	8	
	3,591.	„ „	92	18	6	
	3,592.	„ „	37	11	9	
	3,593.	„ „	48	5	11	
	3,594.	„ „	46	0	6	
	3,596.	„ Buttons & Braids	60	19	5	
	3,599.	„ Waistcoats	106	5	0	
			603	10	8	
Circular wharf	(1157)	10%	60	7	1	
			£663	17	9	£33 3 11

And that the value of such goods mentioned in the said invoice, and therein stated as £603 10*s.* 8*d.*, was to the best of my belief the fair market value of such goods at the time of shipment at the

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place whence the same were exported. Witness my hand, this 8th day of July, 1871.

"(Signed) *R. Adams.*

"Declared before me the 8th day of July, 1871.

"*M. MacTaggart,*

"*pro* Collector."

The five cases which contained trunks and boxes, as well as trimmings and other small goods, were those numbered in the said declaration or bill of entry as 3590, 3591, 3592, 3593, and 3594. *Ad valorem* duty was paid on the declared contents of all five. At the time of the said payment the Appellants produced to the Custom-house officer the invoice from Messrs. *Weintraud, Joyce, & Co.*, relating to the trimmings, but did not produce to him the invoice from Messrs. *Lyons & Son* relative to the said trunks and boxes, nor was any *ad valorem* duty paid in respect of the goods contained in the last-mentioned invoice from Messrs. *Lyons & Son*. Three out of the five cases (viz. Nos. 3590, 3591, 3594) were delivered to the Appellants without being opened or examined. The two numbered 3592 and 3593 were examined on the 13th of July, 1871, and were found to contain, in addition to the trimmings mentioned in the bill of entry, eight travelling trunks or portmanteaus, and twenty-one leather hat-boxes, which were not mentioned in the said declaration or bill of entry, and in respect of which no *ad valorem* duty had been paid or tendered. The portmanteaus and hat-boxes were goods and merchandise upon which by the *Customs Duties Act*, 1871, *ad valorem* duty was payable.

The Respondent *William Augustine Duncan*, as collector of customs in the Port of *Sydney*, thereupon seized the two cases of merchandise as liable to forfeiture under the above-mentioned statutes of the colony.

On the 14th of July, the day after the seizure, the Appellants produced to the Respondent the invoice from Messrs. *Lyons & Son*, and tendered duty upon the value of the travelling portmanteaus and hat-boxes in the said two cases only, which the Respondent refused to receive. The Appellants at the same time applied for permission, under the 12th section of the Act 34 Vict. No. 21, to amend the entry as to value with respect to the two cases that

had been seized. This the Respondent declined to allow. The Respondent then required the Appellants to send to the Queen's Warehouse the three cases which had been delivered to them, in order that the Respondent might cause the said three cases to be opened and examined; which the Appellants declined to do, alleging that the said cases had been sold; but they requested to amend the entry in respect of the same in a similar way, and tendered the increased duties thereon, which request and tender the Respondent declined.

On the 15th of September, 1871, proceedings were commenced by the Appellants in the Vice-Admiralty Court of the colony as claimants of the two cases which had been seized.

On the 28th of December, 1872, the Respondents exhibited their libel or information, praying that the said two cases of merchandise might be pronounced to have been at the time of the seizure thereof subject and liable to forfeiture and condemnation, and to condemn the same as forfeited to the Queen, and, moreover, that the penalties due by law might be pronounced for, and that the Appellants might be condemned in penalties and costs.

The articles of the libel were as follows:—

"First: That a certain statute was made and passed in the ninth year of our Sovereign Lady the Queen, to wit, on the 7th day of November, in the year of our Lord, 1845, intituled 'An Act to provide for the general Regulation of the Customs of *New South Wales*,' and that a certain Act of Parliament was made and passed in the thirty-fourth year of our Sovereign Lady the Queen, to wit, on the 22nd day of May, in the year of our Lord 1871, intituled 'An Act for granting to Her Majesty certain Duties of Custom, and for other Purposes,' and this was and is true, and the party proponent doth allege and propound everything in this and the subsequent articles of this libel or information contained jointly and severally.

"Second: That the said *Henry Prince* and *William Anderson Ogg* are merchants trading together in the City of *Sydney*, in the Colony of *New South Wales*, under the name, style, and firm of *Prince, Ogg, & Co.*, and that as such merchants they did, in or previous to the month of July, 1871, import into the said colony,

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by the ship *Damascus*, from the City of *London*, in *England*, certain goods chargeable with duty according to the value thereof; that after the arrival of the said ship the said *Henry Prince* and *William Anderson Ogg* caused attendance to be made at the Custom-house of the said port of *Sydney* for the purpose of passing an entry of the goods imported by the said ship, and caused a pretended invoice of the goods to be exhibited, and a declaration to be made by one *Robert Adams*, as the agent of and for the said *Henry Prince* and *William Anderson Ogg*, and in such declaration it was declared that the invoice then produced was 'the genuine and only invoice of the goods mentioned in the entry, and contained in certain specified packages (of which packages the two cases of merchandise proceeded against, that is to say, the said two cases of merchandise marked respectively (*P. O. & Co.*) 3592 and (*P. O. & Co.*) 3593 form a part, and that the value of the goods mentioned in the said invoice, and therein stated as £603 10*s.* 8*d.*, was, to the best of the belief of the said *Robert Adams*, the fair market value of such goods at the time of shipment at the place whence the same were exported;' that subsequently to such entry being passed and declaration being made, and after the goods were landed from the said ship, the said two cases of merchandise proceeded against, being a portion of the goods mentioned in the said declaration, were removed to a certain store in the said City of *Sydney*, known as the *Queen's Warehouse*, when it was found that the said two cases of merchandise contained goods chargeable by law with duty according to the value thereof, and which were not included in the value mentioned in the said invoice, nor were the said goods mentioned, nor was the value thereof included in the said declaration, whereupon the said two cases of merchandise proceeded against were at the said store known as the *Queen's Warehouse* seized as being liable to a forfeiture for a breach of some or one of the provisions of the statutes hereinbefore pleaded, and this was and is true, and the party proponent doth allege and propound as before.

"Third: That in part proof of the premises and to all other intents and purposes as the law whatsoever the party proponent doth hereto annex, and prays to be here read and inserted, and taken as part and parcel hereof, a certain paper writing marked

No. 1, and doth allege and propound the same to be a copy of the original entry and declaration made at the said Custom-house, the original thereof being annexed to a certain affidavit made by the said *William Augustine Duncan*, on the 6th day of December, 1871, and filed in this Honourable Court. And this was and is true, and the party proponent doth allege and propound as before.

"Fourth: That all and singular the premises were and are true, of which legal proof being made, the party proponent prays that the said two cases of merchandise may be pronounced by you the Judge aforesaid to have been at the time of the seizure thereof subject and liable to forfeiture and condemnation, and to condemn the same as forfeited to our Sovereign Lady the Queen, her heirs and successors accordingly, and, moreover, that the penalties due by law may be pronounced for, and to condemn the said *Henry Prince* and *William Anderson Ogg* in such penalties and in the costs made and to be made in this cause on the part and behalf of our Sovereign Lady the Queen by your definite sentence or final interlocutory decree to be made and given in this behalf."

The case was heard before the Judge Commissary, Sir *Alfred Stephen*, on the 16th of March, 1872. The present Appellants filed a responsive allegation or pleading in bar of the suit, amounting in general terms to this, that the omission to mention any value in connection with the trunks and boxes, or to specify them as distinguishable from the other contents of the cases seized, was the result purely of mistake and inadvertence; which led to their supplying imperfect information to their agent respecting those articles.

On the 23rd of July, 1872, the Judge delivered judgment rejecting the responsive allegation, decreeing that the two cases should be forfeited, and sentencing the Appellants to pay the costs of suit.

After stating the facts and his deductions from them the Judge proceeded in the following terms:—

"By the *Customs Duties Act* of 1871, the goods contained in all the ten cases in question—the portmanteaus and hat-boxes included—were liable to an import duty of 5 per cent. on the value; and, by sect. 8, a new form of declaration as to that value is

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(not in terms, but impliedly) substituted, for the form prescribed by the *Customs Regulation Act* of 1845, sect. 22. In the latter the required words were, 'that the articles mentioned in the entry, and contained in the packages specified, are of' a stated value. By the recent statute the invoice of the goods is to be produced at the time of entry, and the importer, or his authorized agent, is to declare that it is the genuine and only one 'of the goods mentioned in the entry, and contained in the packages specified—and that the value of such goods, mentioned in the said invoice, and therein stated at (value), was to the best of my belief the fair market value,' &c. This as we have seen was the form pursued by the Respondents' agent here. Then by sect. 13 it is enacted that if in any invoice or entry any goods entered for duty have been fraudulently misdescribed, with intent to avoid payment of the duty thereon, or if the declaration made with regard to any such invoice or entry is wilfully false in any particular, the goods so misdescribed (or in respect of which such declaration is wilfully false) shall be forfeited.

"The first question accordingly for consideration is, are the two cases—or the trunks and boxes in them—liable to forfeiture under this 13th section; and a very perplexing question it seems to me to be. Nothing is said in it about omissions; and a misdescription, however gross, is not made presumptive evidence of intention, leaving it to the owner to establish a case of inadvertence, or the like; but a fraudulent intent must be proved, in the first instance. So, also, the declaration must not only be false—it must be wilfully so.

"Let us consider, then, supposing fraud (in some one) to be established here, as well as a misdescription, whether this is within the enactment. And, in the first place, I dismiss all question as to misdescription, much less fraud, in the invoice. As to that document there is no complaint. It misdescribed nothing: and certainly not any goods "entered for duty"—which is the offence evidently contemplated. I dismiss also all question as to falsity, and still less wilful falsity, in the agent's declaration; for that person, from the very nature of his position, knew nothing whatever about the matters declared to. He only acted on his instructions, and believed whatever his employers told him. Such

is, inevitably, the effect of the system in such cases. But, after all, what was the declaration? Merely, that the document produced was the true invoice of the goods 'mentioned in the entry, and contained in the packages.' The entry itself, or bill of entry, as it is called in one section of the *Regulation Act*, if a distinct document, is not in evidence. But I assume, as really and in fact the counsel on both sides did at the hearing, either that such entry enumerates exactly the same goods as the declaration, or that the latter is identical with the entry. This, however, was obviously not intended by the statute; which assumes that the declaration is a separate act, consequent on the entry.

"On either assumption the declaration was in terms perfectly true. The invoice certainly was not, as I have already observed, an invoice of the goods (that is, of all the goods) contained in the packages; but it was the only invoice of the goods mentioned in the entry—and the enactment, perhaps inadvertently, requires no more. The form indeed shews that the declaration covers only and relates to goods, which, being so mentioned, are mentioned in such invoice also. The goods mentioned in the entry were all, in fact, contained in the packages; and of such only does the agent speak. It was his duty in that document, considered strictly as a declaration, to testify to the value of the goods entered—not to the accuracy of the entry in other respects. The entire section is confined to that one point, the ascertainment of value—the value, that is to say, of the goods mentioned in the produced invoice, and in the entry, and contained in the specified packages. To hold that the declaration here was false, would be to construe the 8th and 13th sections as if the declaration had attested in addition that the packages contained the specified goods, and no more.

"Were not the goods mentioned in the entry, however, or in the declaration, if in fact the only document,—and assuming in the latter case that we may regard it as the entry itself, within the meaning of the statute,—were they not misdescribed? On that point there is indeed no room for doubt, I conceive. Strictly speaking, indeed, the offence was not that the albums, and braids, and waistcoats, or the like, mentioned as the contents of the ten packages, were themselves wrongly described, but that certain

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other goods forming part of the contents were omitted—and so were not described at all. But, in effect, the entry was an entry of the entire contents of the packages. A description of these contents, therefore, as being altogether trimmings or other soft goods, while a portion consisted of leathern hat boxes and portmanteaus, not mentioned, was substantially a misdescription. I think, moreover, that the contents, or stated contents, were "entered for *ad valorem* duty" within the meaning of the enactment; although, on this point, there may be more room for doubt than on the one last preceding. So holding, and that there was a misdescription of the contents of the packages (not of a portion only but of the whole), I must under the recent Act adjudge the packages in question to be forfeited, if I find also that such misdescription was with intent to evade the payment of duty:—in which case the misdescription was clearly fraudulent, legally and morally.

"I am glad, however, to be relieved from the necessity of arriving at, or certainly of announcing, any conclusion on that point; because I am of opinion, notwithstanding all that was urged to the contrary, that sects. 16 and 18 of the *Customs Regulation Act* are not repealed, even if intended to be so, by the Act of 1871—and that sect. 13 of the latter is cumulative on the previously existing enactments. Now, by these (very properly as I conceive) a false description of goods in the import entry subjects them to forfeiture, whether the error be fraudulent or not. It may be regretted, nevertheless, that the opposite extreme would seem here to have been adopted, without any provisions, such as I have elsewhere suggested, for mitigating the penalty in cases of mere mistake.

"By the said 16th section, the person entering goods shall deliver at the Customs a 'bill of the entry' thereof, expressing (among other things) the particulars of the quantity and quality of the goods and the packages containing the same—after which the collector is to grant his warrant for the unlading of the same. It is clear that this enactment is unrepealed; for there is no other in any statute prescribing the contents of any such entry, or even requiring one. Then, sect. 18 enacts that no entry, nor any warrant for the landing of goods, shall be deemed valid, unless

'the goods shall have been properly described in such entry, by the denominations, and with the characters and circumstances, according to which they are charged with duty:'—and any goods 'delivered out of any ship or warehouse, by virtue of any entry or warrant not corresponding in all such respects, or not properly describing the same, shall be deemed goods landed without due entry, and shall be forfeited.' But, for the reasons already assigned, the goods here were not properly described in the entry—since they were not described or mentioned there at all.

"Both statutes, it will have been observed, are defective in their frame, and in more respects than have been pointed out in this judgment; but enough can be collected from them, I conceive, to support the adjudication which I now make, that the two cases or packages proceeded against be condemned. And, since the prosecution is thus not only sustained, but it appears that it has been induced at the Respondents' own instance, the costs of the suit must be paid by them.

"As the matter was much pressed on the argument, I will here add my opinion that the collector had no power, under sect. 12 of the *Customs Duties Act*, to allow an amendment of the entry; for that section clearly applies only to cases of under-valuation—whereas this was an offence or error of a very different character. And, in connection with this subject, I would draw attention to the prescribed form of declaration as to value. That form assumes, referring to the invoices, that the latter in all cases expresses the value of the goods. But an invoice expresses, in point of fact, the charged price simply—which may be very much below, or occasionally may be above, the actual value. And the declaration, I submit, should state in distinct terms that the packages contain the goods entered, and no more, and that those goods are correctly described; whereas, at present, the declaration contains no assertion on either of those points."

Against the said decree the present appeal was brought.

Mr. *Watkin Williams*, Q.C., and Mr. *Cohen*, for the Appellants:—

When the entire requirements of law are considered as they stand in the two statutes, we find new penalties covering part of

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the former ground and superseding the former Act. Sect. 13 of the Act of 1871 imposes a new penalty for misdescription in the entry. But any misdescription in the entry must also be found in the declaration, and the offence intended is misdescription in the entry and also in the declaration, and it requires fraudulent intent. It would seem then that the Legislature intended the new Act to supersede, so far, the old Act, and it meant that a misdescription in the declaration which *ipso facto* subjected the goods to forfeiture under the old Act shall no longer have that effect unless the element of fraud be present.

Here fraud is neither proved nor averred; yet without this there is no forfeiture under the later Act, and the libel charges an offence in the declaration of value, and does not complain of our passing an inaccurate entry. It complains of the declaration only because it does not contain a correct enumeration of the goods. It begins with a complaint of a "pretended invoice," not of an entry.

The libel does not charge an offence under the Act of 1845, nor does our responsive allegation deal with such a charge. The declaration was made and the invoice produced, under the Act of 1871. An erroneous declaration does not, in the absence of fraud, cause a forfeiture under that Act. The responsive allegation is not directed to any charge under the earlier Act, and does not deal separately with the different contents of the packages. The judgment, instead of rejecting the responsive allegation, ought to have directed it to be reformed, and the Court ought to have inquired whether the goods seized were goods in respect of which the offence had been committed. Even if part of the contents of the package had incurred the penalty of confiscation, it was wrong to confiscate the whole package. The language of ss. 25, 82, 86, 98 of the Act of 1845 confirms the view that the words "packages" and "goods" are not convertible, and that the Legislature contemplated the forfeiture only of the particular goods in respect of which there might be omission or misdescription. Omission is distinct from fraud. If it had been a case of fraud, no doubt all the contents of the package might have been affected, but in the absence of fraud, the forfeiture cannot extend beyond the particular goods; just as during a blockade goods may be

seized which are contraband of war, but the rest of the cargo is not liable to seizure.

The Respondents will rely on *Graham* v. *Pocock* (1). In that case the Customs' ordinance of the *Cape of Good Hope* contained provisions corresponding with sect. 18 of the Act of 1845. Certain packages were landed under an entry which described them as containing each a carriage, but the carriages were, in fact, stuffed with corks which were not mentioned in the entry. The Colonial Court declared the entire packages confiscated, and this decision received the sanction of the Judicial Committee; but the case was heard by them *ex parte*, and there was no direct appeal before them on this point; nor are all the provisions of the Customs' law of *New South Wales* the same with those of the *Cape*.

It can scarcely be contended that the whole package is forfeited for a very slight error or omission. The statutes are penal, and must be strictly construed.

The *Attorney-General* (2) and The *Solicitor-General* (3) (with whom were Mr. *E. C. Clarkson*, and Mr. *C. Bowen*), for the Respondents:—

The facts shew improper conduct, which causes a forfeiture under sect. 18 of the Act of 1845. The particulars of the quantity and quality of the goods were not stated in the bill of entry according to sect. 16. It is unnecessary to prove fraud, and we do not go upon that ground. No objection to the pleadings was taken in the Court below, and mere errors of form cannot be insisted on here. The libel is not to be regarded as a proceeding under the Act of 1871, which requires the averment and proof of fraudulent intent. But it refers to both Acts, and sufficiently charges an offence under the earlier Act, and all that is necessary to be proved under the Act of 1845 is fully borne out.

The goods themselves would not be mentioned in the declaration, but in the schedule annexed, and that schedule constitutes the entry, and the omission in it is an offence under the Act of 1845.

The entry and the declaration are united in this document: it

(1) Law Rep. 3 P. C. 345; 7 Moo. P. C. (N. S.) 164. (2) Sir *Henry James*.
(3) Sir *William Harcourt*.

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is at once the entry under the Act of 1845 and the declaration required by the Act of 1871.

The later Act does not repeal the former, but prescribes a new mode of verification and an additional penalty, which applies even in the case of goods not actually landed, but only where there has been fraudulent conduct. The new Act would be insensible if the machinery of the older Act were destroyed. The law does not distinguish between different portions of the contents of a package, and here the proper qualities or the proper quantities are omitted. This omission affects the whole package.

The question is, what goods have been taken out of the ship by virtue of the entry? The whole package has been so taken: the whole contents, specified and not specified, were got out, stating only a part of them. The misdescription relates to the bulk.

There is no analogy between the rules which prevail between Crown and subject and those which are recognized in modern times as between belligerent and neutral. And even in the latter case, if contraband of war be found, all goods on board belonging to the same owner may be seized.

This case cannot be decided in favour of the Appellants without overruling *Graham* v. *Pocock* (1), which held as forfeited all the things comprised in the entry, carriages as well as corks.

The judgment of their Lordships was delivered by

SIR ROBERT J. PHILLIMORE:—

This is an appeal from a decree of the Vice-Admiralty Court of *New South Wales*, which pronounced two cases of merchandise, imported on behalf of *Prince, Ogg, & Co.*, a firm at *Sydney*, and the Appellants, to be forfeited to Her Majesty.

The Appellants had purchased of a *London* firm, Messrs. *Weintraud, Joyce, & Co.*, a quantity of trimmings and other wares called "soft" goods. They had also purchased of another *London* firm, Messrs. *J. Lyons & Son*, certain trunks and hat boxes.

These latter articles had been forwarded in the same cases or packages with the former, in accordance, as it appears, with a

(1) Law Rep. 3 P. C. 345; 7 Moo. P. C. (N. S.) 164.

common practice in the trade, the "soft" goods being packed up in the trunks and boxes.

The invoice from *Lyons & Son* was sent to the Appellants at *Sydney*, and they seem to have been in possession of it when the ship arrived. It was as follows:—

"March 10th, 1871.

"*J. Lyons & Son,*

"*London.*

"6 ea. Cloth Wellingtons 16, 18, 20, 22, 24	.	5¼	13 2 6
1 27 . .	.	5¼	0 11 10
6 ea. S. L. Raily. Co. 20, 22	.	14½	15 4 6
2 24 .	.	14½	2 18 0
1 28 .	.	14½	1 13 10
3 ea. O'land Trunks, 18, 22, 24, 27	.	9	10 4 9
6 ea. Hat cases, 1²/⁶, 2²/¹¹, 3³/⁴	.		2 12 6
3 4 . .	.	4/3	0 12 9
			£47 8 8

"To *Weintraud, Joyce, & Co.*"

The other invoice from *Weintraud, Joyce, & Co.*, is dated—

"*London*, 3 & 4, *Aldermanbury, E.C.*,

"March 20th, 1871,

"as April 1st.

"Invoice of Ten packages marked and numbered as per margin. Shipped per 'Damascus' @ *Sydney*.

"Messrs. *Prince, Ogg, & Co.*

"655 Bought of *Weintraud, Joyce, & Co.*"

This invoice contained a description of the trimmings and other goods contained in the ten packages which had been purchased by the Appellants from Messrs. *Weintraud, Joyce, & Co.*, together with the invoice price, and also description of the boxes and trunks purchased by the Appellants from Messrs. *J. Lyons & Son*, but did not mention the price of such boxes and trunks; and the total value appearing by the invoice to be the value of the goods

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therein mentioned was, in fact, only the invoice price of the goods purchased from *Weintraud, Joyce, & Co.*, and did not include the price of the boxes and trunks purchased from Messrs. *J. Lyons & Son.*

The cases, or packages, were ten in number, five of which contained the trimmings, and the trunks and boxes.

About the 8th of July, 1871, all the ten cases were entered for payment of *ad valorem* duty at the *Sydney* Custom-house, and the following declaration was made by the agent of the Appellants' firm :—[His Lordship here stated the terms of the declaration (1).]

At the same time, the invoice from *Weintraud & Co.* was shewn to the collector of the Customs, and was stamped by him.

The five cases which contained the trimmings and trunks are those numbered 3590–3594 inclusive, and were landed by the Appellants.

Three out of the five were removed by the Appellants ; two, numbered 3592 and 3593, were examined at the Queen's warehouse on the quay. They were found to contain eight trunks and twenty-one hat boxes not mentioned in the declaration or bill of entry, and for which no *ad valorem* duty had been paid, such duty being payable upon them.

They were seized by the Custom-house officer, as forfeited to the Queen under the authority of certain statutes about to be mentioned.

Afterwards, the Appellants produced to the Custom-house officer the invoice from *Lyons & Son*, and tendered duty upon the value, which was refused. They also applied for leave to amend the entry as to value, which was denied; and it is admitted the denial was lawful, and no complaint is founded upon it.

The Appellant took out a monition from the Vice-Admiralty Court against the seizor to proceed to adjudication on the two cases. Objections were taken to the jurisdiction of the Court, and overruled. Finally, the proceedings were conducted in solemn form, by plea and proof, and the seizor brought in his libel or information, the admissibility of which was not opposed.

The Appellants brought in a responsive allegation, the admissibility of which was opposed ; and the Judge, after hearing argu-

(1) *Supra*, p. 7.

ments, delivered a written sentence rejecting the allegation, and also by interlocutory decree pronounced the two cases to be forfeited to the Queen, and condemned the Appellants in costs.

It may be well to observe here that no objection was taken in the Court below to this course of proceeding on the part of the Judge, in not only rejecting the responsive allegation, but also in adjudicating upon the whole case. It appears to have been acquiesced in by both parties, probably for the purpose of saving expense, there being no dispute as to the facts, and perhaps for the sake of facilitating an appeal. Nor has it been contended before their Lordships that the sentence was invalid on this ground. Their Lordships have, therefore, to consider both whether the responsive allegation was properly rejected, and whether the sentence on the merits was right. Substantially, indeed, the two questions are one.

There are two colonial statutes on the true construction of which this case depends: the *Customs Regulation Act* of 1845, and the *Customs Duties Act* of 1871:—[His Lordship here stated the material parts of these statutes (1).]

These Acts in *pari materiâ* are very loosely and carelessly drawn; but the true construction appears to their Lordships to be that the 16th and 18th sections of the former Act are not by implication (directly, they certainly are not) repealed in *toto* by the latter Act, the 8th section of which only so far affects the provisions in the former Act respecting entries of articles on which *ad valorem* duties are payable, that it supersedes the mode of ascertaining their value by a new mode of verification, namely, the production of the invoice, and another form of declaration; but otherwise it leaves the existing machinery under the former Act respecting entries, untouched.

Now it is manifest that, according to the provisions in the first Act, these two condemned cases were not properly described in the entry, on account of the omission of the trunks and boxes, that they were "goods landed without due entry," and therefore "forfeited."

It has been contended that the error was in the *declaration*

(1) *Supra*, p. 3.

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and not in the *entry*, and that an erroneous declaration does not enure to the forfeiture of the goods; but in their Lordships' opinion the error is in the entry; for although there appears to be no separate bill of entry, they think the document called the declaration contains in it the entry. The declaration appears, for the sake of convenience, to be written on the same paper; but although, in form, there is one instrument only, the document in substance contains both the bill of entry and the declaration, and must be treated as containing both in considering whether the provisions of the statute have been complied with.

It has also been contended that, at any rate, the confiscation of the whole of the packages, including the trimmings and goods of that kind, was wrong, inasmuch as the entry of them was not incorrect, and that the wrong entry or non-entry of the trunks and boxes cannot contaminate the other goods, and the forfeiture ought to have been confined to the trunks and boxes. Their Lordships are of a different opinion. They think that under the bill of entry must be included every package that was landed; and that, although a bill of entry may contain more than one "entry" within the meaning of the Act, no entry can cover less than one entire package. The Custom-house officer does not open the package, and every package must correspond with the mark or number in the manifest of the master.

Their Lordships have considered a former decision of this Court in the case of *Graham* v. *Pocock* (1), in which the circumstances were the converse of those in the present case; and they conceive this ruling to be in accordance with the principle laid down in that judgment.

There yet remains to be considered the argument arising upon the pleadings in this case.

It is contended that the libel did not sufficiently or distinctly allege the law under which the goods are to be forfeited: that it, in fact, laid no charge under the Act of 1845, but simply one of fraudulent misdescription and wilfully false declaration under the 13th section of the second Act; that the Judge of the Court below acquitted the Appellants of these charges, and that they are now

(1) 7 Moo. P. C. (N.S.) 164; Law Rep. 3 P. C. 345.

abandoned, but that if they are not abandoned the responsive allegation being exclusively directed to rebutting these charges, ought to have been admitted to proof.

In the first place, it seems clear that this objection was not set up in the Court below, but that the whole question and the construction of both Statutes were fully discussed by both parties.

In the next place their Lordships are of opinion that this objection is otherwise not maintainable.

It is, indeed, unfortunately true that the libel is very ill drawn, and is much wanting in perspicuity and precision; and it would have been competent to the Appellants to have objected to its admissibility, and caused it to be reformed on these grounds, but they did not take this course.

In the libel, however, both statutes are mentioned, and facts and charges are alleged in a manner to support a case under both statutes or either. It may also be observed that the Crown could scarcely have intended to rely on the latter statute only; the charge of fraudulent mis-description and wilful falsity is not laid in the libel as it should have been if it was intended to rely upon these charges as a ground of forfeiture, under the 13th section of the second Act.

Upon the whole, their Lordships are of opinion that the judgment of the Court below ought not to be disturbed, and they will humbly advise Her Majesty that it ought to be affirmed, and that the Respondents are entitled to the costs of this appeal.

Solicitors for the Appellant: *Parker & Clarke.*

Solicitor for the Respondent: *F. H. Dyke, Esq., Her Majesty's Procurator-General.*

J. C.* 1873 Nov. 12, 13.

JAMES NEWNHAM BLACKMORE (the nominal Defendant appointed by the Governor of Her Majesty's Province of South Australia and the Dependencies thereof, (Defendant) . } APPELLANT;

AND

THE NORTH AUSTRALIAN COMPANY, LIMITED (Plaintiffs) . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Colonial Act—Statutory Obligation—Refund of Purchase-Money.

A Colonial Government having, under a Colonial Act, invited applications for Orders which should entitle the holders to receive within five years allotments of land surveyed by the Government for the purpose, *A.* obtained and paid for several such Orders. Five years elapsed without any land having been allotted to *A.* Before the expiration of the five years an Amending Act was passed whereby holders of Orders under the earlier Act were enabled, but were not required, on application within nine months to receive certain allotments in lieu of those secured to them under the earlier Act:—

Held, that the Government had entered into a positive contract to survey within five years, and that *A.* on giving up the Orders was entitled to a refund of principal and interest from the time of payment.

THIS was an appeal from three judgments or decisions of the Supreme Court of *South Australia.*

The facts were as follow:—

In the year 1863 a large tract of land, situate to the north of the colony of *South Australia*, and previously unexplored, unsettled, and uncivilised (hereinafter referred to as the Northern Territory), was, by letters patent of Her Majesty the Queen, annexed to the colony of *South Australia* for the purposes of colonization and settlement as the Governor of *South Australia*, by and with the advice and consent of the Legislative Council and House of Assembly of the province in Parliament assembled, should enact.

A statute of the Colonial Legislature of *South Australia* was accordingly passed in the year 1863 (26 & 27 Vict. c. 23). It is intituled "An Act for regulating the sale or other disposal of waste

* *Present*:—LORD PENZANCE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

lands of the Crown lately annexed to the province of *South Australia*, and for other purposes;" and is commonly known as "The *Northern Territory Act*, 1863."

The statute contains the following provisions:—

Sect. 2: "Notwithstanding anything contained in the said Act No. 5 of 21 Vict. and No. 18 of 1858, 500,000 acres of the waste lands of the Crown, being country lots, and 1562 town lots (such town lots to contain half an acre or thereabouts), within the said territory, may be sold by private contract at the prices and in manner hereinafter mentioned."

Sect. 3: "The Governor, with the advice and consent of the Executive Council, shall appoint an officer in *London* and an officer in *Adelaide*, who shall, on certain days to be fixed by the Governor, with the advice and consent aforesaid, by proclamation in the Government *Gazette*, open an office in *London* and *Adelaide* respectively for the receipt of applications from persons desirous of becoming purchasers of the lands mentioned in the last clause, and such offices respectively shall remain open for the receipt of such applications as aforesaid for twenty-eight days after the first day named for receiving such applications, subject to the list being closed at an earlier period in accordance with the regulations hereinafter authorized to be made; and immediately after the expiration of such periods such officers shall, in manner hereinafter provided, proceed to allot to the persons applying the land so applied for at the rate of 7*s.* 6*d.* per acre, and, on compliance with the said regulations as to the terms and conditions of payment or otherwise, shall issue to such persons preliminary land orders, which shall state the number of acres and town lots sold and authorized to be selected."

Sect. 4: "The mode of allotment of lands so applied for shall be as follows:—

"I. 125,000 acres of country and 781 town lots shall only be allotted by the officer in *London*, and the like quantity by the officer in *Adelaide*, under Clause 3."

Sect. 6: "Every preliminary land order, or land order issued under the preceding clause, shall entitle the purchaser or his transferee or nominee, within five years from the date thereof, to select

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from and out of the surveyed country lands in the said territory the particular land whereof he will become the purchaser; and upon such selection being notified to the Government resident or other officer to be appointed for that purpose, and production of such land order, the said resident or such officer as aforesaid shall deliver to such purchaser, transferee, or nominee, a valid grant of the fee simple of the land so selected: Provided that all holders of preliminary land orders, or land orders held over the aforesaid five years, shall be entitled to tender the said preliminary land order or land order in lieu of the amount of its original cost in payment of the purchase-money of land within the said territory under the Crown lands' regulations for the time being."

Sect. 11: "The Governor, with the advice and consent of the executive council may from time to time make, vary, and alter such rules as may be necessary for regulating the terms, period, or mode of leasing or occupation, or the disposal by sale of the said waste lands of the Crown, the person or persons to whom the purchase-money may be paid, the mode and order of selecting land by persons holding land orders as aforesaid, the mode of keeping the accounts, and when and in what manner such accounts shall be audited, and generally make all and every such regulations as to him may seem necessary and proper to carry out and give effect to the provisions of this Act, and all such regulations when published in the Government *Gazette* shall have the force of law."

In pursuance of the provisions of the *Northern Territory Act*, 1863, rules and regulations necessary for working the Act were duly made and published in the South Australian Government *Gazette* of the 26th day of November, 1863.

Those portions of the regulations which are material to the present appeal are as follow:—

"3. Every such application must be for 160 acres of country land and one town lot, or for some multiple thereof, in the form or to the effect set forth in the schedule hereto annexed, marked A, to be signed by the applicant and accompanied by a deposit receipt for £20 for each and every lot of 160 acres so applied for, as part payment of the purchase-money, and the balance must be paid within fourteen days from the day of allotment; but if the appli-

cant shall neglect to pay the balance as aforesaid, his deposit shall be actually forfeited, and the land so allotted may be re-sold without notice.

"4. The officer in *London* and the officer in *Adelaide* will each have power to keep his office open daily from ten o'clock A.M. to three o'clock P.M. for twenty-eight days after the 1st day of March, 1864, for receiving applications for the 125,000 acres of country land and 781 town lots authorized to be sold under Clause 3 of the Act, or to declare the list closed at an earlier period as soon as he shall have received applications from 781 applicants.

"5. In case the whole quantity of the first 125,000 acres of country land and 781 town lots is not applied for either in *London* or *Adelaide* during the time within which applications may be received, the remainder must be withdrawn, and cannot be offered again at less than 12*s.* per acre, pursuant to the Act.

"6. As soon as the lists of applications for the first 125,000 acres of country land and 781 town lots are closed the officers shall, after giving seven days' notice by public advertisement, proceed, at the appointed times and places, to allot to each applicant 160 acres of country land and one town lot, and the remainder (if any) shall be allotted *pro ratâ* according to the quantity applied for by each applicant in excess of 160 acres; provided that every such allotment *pro ratâ* shall be 160 acres of country land and one town lot, or some multiple thereof.

"7. On the allotment of the land sold under Clause 3 being completed and the balance of purchase-money being paid, the officers shall respectively issue in duplicate preliminary land orders to the persons entitled to receive them, which preliminary land orders shall each be for one lot of country land of 160 acres and one half-acre block of town land.

"14. All purchase-money payable in *London* under the Act shall be paid to the Agent-General of *South Australia* or his order, and all purchase-money payable in *Adelaide* under the Act shall be payable to the treasurer of *South Australia* or his order.

"15. On the arrival of the Government Resident in the new territory the site of the principal town will be determined and surveyed, and the plan of the town mapped out in half-acre lots and exhibited for public inspection, when a general meeting of the

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holders of the preliminary land orders, or their agents, shall be held at such principal town, such meeting not to take place earlier than the 1st of September, 1864; and the order in which they shall select their town land shall then be decided by lot, and the selection shall forthwith be made under the superintendence of the Government Resident, who shall, after such selection, reserve a sufficient number of town lots to meet the requirements of the holders of such outstanding preliminary land orders as shall not have been exercised at such meeting; and from the lots thus reserved the holders of such preliminary land orders may make selection in the order in which they may apply for the same.

"16. When the surveys of country land have been completed to a sufficient extent another general meeting of the holders of the preliminary land orders, or of their agents, shall be held not earlier than the day aforesaid, when the order in which they shall select their country lands shall be decided by lot; and the selection in the order of choice must be made, under the superintendence of the Government Resident, within one month from the date of the holding of such meeting, and any selection not made in the order of choice by the holders of preliminary land orders within that time may be made at any time within five years from the date of the preliminary land order, but will not be entitled to any preference over land orders.

"17. The selection of lands under land orders may be made from any surveyed lands open for selection after the expiration of one month from the date of the first selection under preliminary land orders, and in the order in which application is made for the same.

"Schedule A.

"Form of Application.

"To , the officer appointed for the sale of land under the *Northern Territory Act* of *South Australia*.

"Sir,—Having paid to the sum of , the receipt for which is forwarded herewith, I hereby request you will allot me acres of country land and town lots authorized to be sold, at 7*s.* 6*d.* per acre, under Clause 3 of the *Northern Territory Act* of *South Australia;* and I hereby agree to accept such land pursuant to the said Act and the regulations issued under the

authority thereof, or any smaller quantity of land not being less than 160 acres and one town lot that may be allotted to me. And I further agree to pay the balance of purchase-money, and to conform in all respects to the terms of the said regulations.

"I am, Sir, your obedient servant,

[Signature.]"

Afterwards *Gregory Searle Walters*, Esq., the Agent-General of *South Australia*, was duly appointed the officer in *London* for the purposes of the *Northern Territory Act* and the said rules and regulations, and on the 1st day of March, 1864, he duly opened an office in *London* for the receipt of applications from intending purchasers of lands.

The applications and payments having fallen short of expectation, certain persons, with the approbation of Mr. *Walters*, as such agent, proposed to form a company for the purchasing of all such allotments as the public might decline to take, and for other purposes in connection with this matter.

Before the closing of the list of applications in *London* for the first 125,000 acres of country land and 781 town lots, as provided in the 4th regulation, the promoters and some of the first directors of the intended company, which had not then been registered or incorporated, on behalf of the company, signed and delivered at Mr. *Walters's* office an application in the words and figures following:—

"*Bucklersbury*, 29th March, 1864.

"Sir,—We beg to forward you herewith a cheque on the *Imperial Bank, Limited*, for £8000 for the purchase of lands—town and country lots—in the Northern Territory of *South Australia*.

"It is to be understood that the demands of private individuals shall be satisfied before you allot any lands upon this application."

"We are, Sir, your very obedient servants,

"(Signed) *A. S. Elder*" [with four others].

"*G. S. Walters*, Esq.,

"Agent-General for *South Australia*,

"5, *Copthall Court, London, E.C.*"

And the same, together with a cheque for £8000, signed by the same persons, was duly received by Mr. *Walters*.

It appeared by the documentary evidence in the cause that the

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terms upon which the promoters offered, and the Agent-General, with the consent and acquiescence of the Colonial Government of *South Australia*, accepted the proposals of the promoters, were that this letter and deposit were to be taken as an application and deposit made under the said *Northern Territory Act* and regulations on behalf of a company formed but not registered, for so much of the land included in the third rule or regulation as should not be applied for otherwise than by or on behalf of the Respondents.

After the application, but previously to any allotment of land (namely, on the 26th day of April, 1864), the applicants, the present Respondents, became registered and incorporated as a company in *England*, with limited liability, under the *Companies Act*, 1862, and duly notified the fact to Mr. *Walters*, requesting him at the same time to insert their name in lieu of the names of the promoters, in the needful documents, and to accept the cheque of the Respondent Company for £6560 in lieu of the cheque for £8000 given as a deposit as aforesaid.

The said sum of £6560 was the exact amount of the deposit payable for the lots of land (being 328) not applied for by the public, and was accepted by Mr. *Walters* on behalf of the Government of *South Australia* in lieu of the said cheque for £8000, which was cancelled by Mr. *Walters*. The balance of the purchase-money, amounting to £13,181 10*s*., was afterwards (that is to say, on the 28th of April, 1864) received from the Respondent company by Mr. *Walters*, and on the 23rd day of December, 1864, the preliminary land orders for the 328 lots so purchased by the Respondents were signed and issued to the Respondents by Mr. *Walters*. The said two sums of £6560 and £13,181 10*s*. were duly received by the Government of *South Australia*.

Varying only the number in each case, the said 328 preliminary land orders issued to the Respondents were in the following form :—

"South Australian Northern Territory Preliminary Land Order.

Part 1. Original.

"(No. 454.)

"In pursuance of the provisions of the *Northern Territory Act*, the *North Australian Company, Limited*, of 4, *Adam's Court*, hath paid for one lot of land, consisting of a town section of half an

acre or thereabouts, and a country section of 160 acres, with a right of priority of choice, as provided in the regulations passed in pursuance of the provisions of the said Act. So soon as the said land shall have been selected, you are to put him, his agent, or assigns, into possession thereof, and to procure a grant thereof to be made to him, his heirs, and assigns, subject to the laws and regulations of the province of *South Australia*. This preliminary land order is issued in duplicate, and upon presentation of either copy the other will become void. Dated in *London* this 23rd day of December, 1864.

"*G. S. Walters*, Agent-General.

"Entered, *Thomas F. Smith*.

"To the Government Resident appointed under the *Northern Territory Act*."

At the time of the passing of the *Northern Territory Act*, 1863, no country lands had been surveyed in the Northern Territory therein referred to.

On the 24th day of November, 1868, an Act was passed to amend the said *Northern Territory Act* of 1863.

The preamble recites that—

"Whereas, under the provisions of the *Northern Territory Act*, preliminary land orders and land orders have been issued to various persons, entitling the purchaser, or his transferee or nominee, within five years from the date of such preliminary land orders or land orders respectively, to select certain lands as in the said Act is more particularly mentioned. And whereas the purchasers of such preliminary land orders or land orders respectively, or the transferees or nominees of such purchasers, may not have an opportunity within such period of five years of exercising their rights thereunder in selecting, from and out of the surveyed country lands in the said Northern Territory, the particular lands of which they will become the purchasers, by reason of a sufficient quantity of land from which selections can be made not having been surveyed within the said Northern Territory; and it is therefore desirable to extend the time within which such purchasers, transferees, or nominees may exercise their right of selection as aforesaid; and it is also desirable to compensate them for the delay which must occur in the completion of the necessary surveys by allowing the

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purchaser of every preliminary land order or land order as aforesaid, or the transferee or nominee of any such purchaser, to select, within the time in that behalf hereinafter limited, an area of 320 acres of land for and in lieu of every 160 acres of land which, by any such preliminary land order or land order as aforesaid, he is entitled to select."

And it is, among other things, enacted that—

Sect. 2: "Save in so far as the same is amended by this Act, the said *Northern Territory Act* shall be incorporated and read and construed herewith as forming one Act."

Sect. 4: "The purchaser of any preliminary land order or land order under the provisions of the said *Northern Territory Act*, or the transferee or nominee of any such purchaser, shall be entitled, within five years from the passing hereof, to select, from and out of the surveyed country lands in the said territory, the particular lands of which he will become the purchaser; and in such selection such purchaser, transferee, or nominee shall be entitled to select an area of 320 acres of country land for and in lieu of every 160 acres of country land which he would, within the period of five years from the date of any such preliminary land order or land order, have been entitled to select thereunder; and upon such selection being notified to the Government Resident or other officer to be appointed for that purpose, and production of such preliminary land order or land order, as the case may be, the said Resident or such officer as aforesaid shall deliver to such purchaser, transferee, or nominee, a valid grant of the fee simple of the land so selected," &c.

Sect. 5: "Notwithstanding anything herein contained, the purchaser of any such preliminary land order or land order as aforesaid shall not, nor shall the transferee or nominee of any such purchaser, be entitled to select a larger area than 160 acres of country land, unless such purchaser or transferee shall, within nine months from the passing hereof, by a notice in writing to the Commissioner of Crown Lands and Immigration, signify his intention to accept the increased area of 320 acres, as provided by the 4th section of this Act, in full satisfaction and discharge of all claims and demands under all preliminary land orders or land

orders respectively held by him at the date of such notice; and such notice shall be in the form or to the effect following, that is to say:—

"To the Commissioner of Crown Lands and Immigration.

"Sir,—I [*name at full length*], of [*place of abode and description*], being the purchaser [*or* transferee] of a preliminary land order [*or* preliminary land orders] No. [*or* land order or land orders No.], under the provisions of the *Northern Territory Act*, do hereby give you notice that it is my intention, in accordance with the provisions of the *Northern Territory Amendment Act*, 1868, to accept an increased area of land, containing 320 acres of country land, for and in lieu of every 160 acres of country land which, under and by virtue of such preliminary land order [*or* preliminary land orders, or land order or land orders, *as the case may be*], I am entitled to select; and I hereby agree that I will accept the said increased area in full satisfaction and discharge of all claims and demands whatsoever in respect of such country land under or by virtue of such preliminary land order [*or* preliminary land orders, or land order or land orders, *as the case may be*], under or by virtue of any other preliminary land orders or land orders respectively now held by me.

"Dated this day of , 186 .

"And such preliminary land orders or land orders respectively shall not be deemed or taken to confer, or to have conferred, upon any purchaser or transferee giving such notice any estate, right, title, or privilege whatsoever otherwise than as is provided by the 4th section of this Act."

At the expiration of five years from the 23rd day of December, 1864 (the date of the said preliminary land orders), the site for the principal town had not been determined on, or surveyed, or mapped out in half-acre lots, and exhibited for public inspection, nor had there been any general meeting of the holders of preliminary land orders, as required by the rules and regulations.

The Respondents never claimed to be entitled to the larger allotments of land mentioned in the 4th section of the *Northern Territory Amendment Act*, 1868, in lieu of the allotments mentioned in the 328 preliminary land orders held by them, nor did

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they ever give such notice as is mentioned in the 5th section of the *Northern Territory Amendment Act.*

In March, 1870, the Respondents presented a petition to Sir *James Fergusson*, the Governor of *South Australia*, whereby, after alleging that they had been deprived of the benefit of the said preliminary land orders, and that the Local Government of *South Australia* was indebted to them for the money they had so as aforesaid paid with interest, they prayed his Excellency to grant the redress to which they claimed to be entitled, and for a reference of their said petition to the Supreme Court for trial, and for the appointment of some person to be a nominal Defendant in the matter thereof, in accordance with the provisions of the *Claimants Relief Act* of 1853 (1).

The Governor thereupon referred the said petition for trial to

(1) By an Act passed in 1853, and known as the *Claimants Relief Act* (No. 6 of 1853), it is enacted that—

(Sect. 1) "In all cases of dispute or difference touching any pecuniary claim between any subject of Her Majesty and the Colonial Government of the province of *South Australia* which may have arisen, or may hereafter arise, within the said province, it shall and may be lawful for any person or persons having such disputes or differences to present a petition to the Lieutenant-Governor for the time being of the said province, setting forth the particulars of the claim of such petitioner or petitioners, to which petition there shall be attached a certificate from some practising barrister of the Supreme Court of the said province to the effect that such petitioner or petitioners has or have, in the opinion of such barrister, a proper case for redress or cause of complaint against such Local Government, which petition shall, within fourteen days from the presentation thereof, be referred by the Governor to the Supreme Court of the said province for trial by a jury or otherwise, as such a Court shall after such reference direct." (With a proviso reserving claims that may affect the royal prerogative.)

And also that—

(Sect. 2) "At the time of such reference for trial as aforesaid the Governor shall name some person or persons to be a nominal Defendant or Defendants in the matter of such petition, the petitioner or petitioners being the Plaintiff or Plaintiffs therein." (With a proviso saving the personal liability of the nominal Defendant.)

And also that—

(Sect. 4) "The said Supreme Court shall and may make such rules or orders for the regulation of the proceedings on any such petition as to such Court shall seem necessary, and the parties thereto shall have the same rights, either by way of appeal, rehearing, motion for reversal of verdicts, or otherwise, as in ordinary cases of law or equity."

And also that—

(Sect. 5) "Costs of suit shall follow on either side, as in ordinary cases between suitors, any law or practice to the contrary notwithstanding."

the Supreme Court, and nominated the Appellant to be a nominal Defendant to defend the same.

On the 3rd of May, 1870, the Supreme Court ordered that the Petitioners should be at liberty to issue a writ against the Appellant, and that thereupon the proceedings should be in the form of an ordinary action at common law, and conducted in like manner.

Accordingly the Respondents, on the 5th day of May, 1870, issued a writ from the said Supreme Court against the Appellant; and on the 23rd day of August, 1870, they delivered their declaration and particulars of demand.

The declaration, after setting forth the facts of the case as above stated, alleged that five years after the date of the said preliminary order there were no surveyed country lands in the said territory ready for selection, and the Colonial Government of *South Australia* did not cause a reasonable and sufficient quantity of country land to be surveyed in the said territory, wherefrom the Plaintiffs could select the 160 acres of country land referred to in the said preliminary land order, and did not cause the site of the principal town of the said territory to be determined or surveyed. And further, that the said Colonial Government of *South Australia* wholly neglected and refused to perform on their part the contract for sale to the Plaintiffs, in the terms therein mentioned, of the said 160 acres of country land and one town lot, whereby the Plaintiffs lost the sum paid by them for the said land and the use of the said money.

There were 327 other counts exactly similar to the first count, but relating to the other land orders respectively, and also an ordinary money count, under which the said purchase-money was claimed.

On the 1st of September, 1870, the Respondents signed judgment against the Appellant for want of a plea. The Supreme Court granted a rule nisi to set aside the judgment, and the attorneys for the Respondents and the Appellant consented to a rule being drawn up and an order being made setting aside the judgment so signed, and that the trial of the petition should be upon the issues which might be raised upon the said declaration and the pleadings consequent thereon, and that the Appellant should be at liberty to plead or demur thereto as he might be advised, and that

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all proceedings subsequent thereto should be conducted according to the rules and practice of the said Supreme Court in actions at common law, and that the parties should have the same rights and the Court the same powers as to amendment as in an ordinary action at common law.

Pursuant to the afore-mentioned rule, the Appellant pleaded to the said declaration ten pleas, of which one—namely, the tenth —was an equitable plea.

Mr. Justice *Wearing*, on the application of the Respondents at Chambers, ordered certain of the said pleas, not including the said equitable plea, to be struck out; and thereupon the Appellants struck out the said pleas so ordered to be struck out, leaving eight pleas, of which the said equitable plea, formerly the tenth, was the eighth.

The first six pleas were pleaded to the said special counts.

The first plea alleged an exoneration and discharge by the Plaintiffs before breach.

The second plea denied the making of the alleged allotments.

The third plea denied that the said five persons were promoters and directors of the Plaintiffs' company.

The fourth plea denied that the said persons signed and delivered the applications mentioned on behalf of the Plaintiffs' company.

The fifth plea is now immaterial, as it was struck out at the trial by consent.

The sixth plea averred that after the making of the said allotments, after the passing and in accordance with the provisions of the *Northern Territory Amendment Act*, 1868, certain rules and regulations in the said sixth plea set out were duly made and published, whereby the regulations numbered 15, 16, and 17, set out in the declaration, were rescinded, and in lieu thereof other regulations made; and the plea alleged that all things were done by the Colonial Government necessary to be done and required by the said Acts and regulations.

The seventh plea was pleaded to the money count of the declaration, and denied that the said Government was ever indebted as alleged.

The equitable plea set out the circumstances which led to

the passing of the *Northern Territory Act*, and that before and at the time of the said allotments it was known to the Plaintiffs that, until the said Northern Territory had been explored, and a site suitable for the principal town, and a locality suitable for the survey of the country and town lands, had been discovered, the Government of *South Australia* could not be required to survey, and could not, in fact, survey any lands wherefrom the Plaintiffs could select.

The plea then set forth the various expeditions sent out by the Government for the purpose of making the aforesaid exploration and discovery. It then stated that *Boyle Travers Finniss* explored the said territory, and came to the conclusion that *Adam Bay* and the neighbourhood were suitable for the afore-mentioned purposes, and that he accordingly selected *Adam Bay* as the place for a settlement, and determined the site for the capital, and proceeded to survey the same pursuant to the afore-mentioned regulations, and completed a survey of a large portion of land on the banks of the *Adelaide* by the end of October, 1864. The plea further stated that numerous holders of preliminary land orders disapproved of the said site, and requested the Government to have another site selected, and that thereupon, at the request of the said holders of preliminary land orders, and especially at the request of Mr. *John McKinlay*, the agent of the Plaintiffs, the said Government disapproved of the said site, and employed the said *Boyle Travers Finniss* on another exploring expedition for the same purpose; and that in March, 1865, the said *John McKinlay* was appointed by the Plaintiffs their agent to select their town and country lots for them, and that while he was such agent he was engaged by the said Government, with the express consent of the Plaintiffs, to take charge of another expedition in furtherance of the aforesaid purposes; but the said *John McKinlay* having discovered no suitable site or locality, and the expedition of which he was in charge and the other expeditions sent out by the said Government having proved unsuccessful, and the said Government having done all that could reasonably have been done for the afore-mentioned purposes, and not having succeeded, the *Northern Territory Amendment Act* was passed; and in accordance with the powers contained in that Act the rules and regulations numbered 15, 16, and 17, and set

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out in the declaration, were rescinded, and in lieu thereof other regulations made, according to which the selection of the allotments was to be made in May, 1870. And afterwards another expedition was fitted out for exploring the Northern Territory, and before the 31st of August, 1869, a reasonable and sufficient quantity of land in the said territory was selected wherefrom the Plaintiffs could have made their selection. The plea then stated that the said Government was afterwards always ready and willing to perform their contract with the Plaintiffs, that the surveying of the said lands was delayed at the request of the said *John McKinlay* as agent for the Plaintiffs, and that such delay operated greatly to the benefit and advantage of the Plaintiffs; and finally, that the period of five years mentioned in the declaration was not of the essence of the contract, and that it was inequitable for the Plaintiffs to maintain this action.

On the 29th of May, 1871, the Supreme Court, upon the application of the Appellant, granted a rule nisi calling upon the Respondents to shew cause why the order of Mr. Justice *Wearing* for striking out the equitable plea should not be set aside.

On the 9th of June, 1871, by a rule or order of the said Supreme Court, the rule nisi was discharged with costs.

The equitable plea having been struck out as aforesaid, the Respondents joined issue on all the pleas except the sixth plea, and demurred to the third, fourth, fifth, and sixth pleas; and the Appellant demurred to all the counts of the declaration except the money count.

On the 4th of July, 1871, the cause came on for trial before Mr. Justice *Gwynne* and a special jury.

At the trial it was agreed by the parties the fifth plea should be struck out, and a verdict was found on the special counts for the Respondents for £33,818 12*s.* 3*d.*, being the said purchase-money of £19,741 10*s.* and interest, and a verdict for the Appellant on the money count, with liberty for the Court to enter up a verdict on the common count for the Respondents for the aggregate of the amounts for which the verdict was entered on the special counts, being principal and interest, or for the principal only — viz. £19,741 10*s.* — if the Respondents should fail on the special counts, either on motion for verdict to be entered up for the

Appellant on those counts, on error, or on demurrer to the declaration or pleas, or otherwise; and that, if necessary, a count for interest might be added.

On the 25th of July, 1871, upon the application of the Appellant, the Supreme Court granted a rule nisi calling upon the Respondents to shew cause why the verdict obtained by the Respondents on the special counts should not be set aside and a verdict entered for the Appellant, or a new trial granted between the parties, on the ground of misdirection of the learned Judge who tried the cause in directing the jury that there was a contract between the Respondents and the Appellant. And it was thereby further ordered that the Respondents should have liberty, if the verdict upon the special counts were set aside and a verdict entered for the Appellant, to move the Court to enter the verdict upon the common count for the Respondents for the aggregate of the amounts for which the verdict was entered on the special counts, being principal and interest, or for the principal only, namely, £19,741 10s.

On the 1st of August, 1871, the Supreme Court, having heard the argument of the demurrers on the record, and also the arguments on the rule nisi, gave judgment discharging the above-mentioned rule of the 25th of July, 1871, with costs, and overruling the demurrer to the special counts, and upholding the demurrer to the sixth plea, and ordered the demurrers to the other pleas to be struck out without costs on either side.

On the 23rd of September, 1871, the Appellant, having applied to the said Supreme Court for leave to appeal from the rule or order of the 9th of June, 1871, the Supreme Court declined to give the Appellant leave to appeal from the rule or order, but granted the Appellant leave to appeal to Her Majesty in Council from the judgment of the Supreme Court of the 2nd of August, 1871, on the grounds that the demurrer to the declaration ought not to have been overruled, and that the demurrers to the pleas should have been overruled, and that the rule should have been made absolute for a new trial.

On the 5th of February, 1872, upon the petition of the Appellant, leave was given to the Appellant by Her Majesty in Council to appeal from said rule or order of the said Supreme Court of the

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9th of June, 1871. And it was ordered that such appeal should be consolidated with the appeal from the judgment of the 1st of August, 1871, and heard upon one printed case.

The consolidated appeals now came on to be heard.

Sir *John B. Karslake*, Q.C., and Mr. *Cohen*, for the Appellant:—

The proper way of proceeding in such a case as this would have been by Petition of Right, and not according to the strict forms of a strict common law action. The equitable plea ought not to have been struck out, as without it the Government cannot shew the merits of the case.

[It was ultimately arranged that the matters contained in the equitable plea should be submitted to the Judicial Committee, and that if it should be necessary to try any question of fact arising out of the plea, the case should go back to the colony for the trial of such question.]

Under the earlier Act there was only a statutory obligation upon the Government in the nature of an unilateral contract. There was no contract except to the effect contained in the statute and the land order. The consideration has not failed, the Plaintiffs still have their land orders and can select land. Although the Government granted Orders which would entitle the Plaintiffs to receive allotments of land when the land should have been surveyed, yet the Government did not bind itself to execute a survey within five years, and it did no wrong to the Plaintiffs when it subsequently abandoned the settlement originally contemplated and ordered a fresh exploration in order to find a better site for the benefit of the Plaintiffs, as of all others who were concerned, and who pressed the Government to act as it did. The intention was that if the land were surveyed the Plaintiffs should have a right to select their lots; and if none were surveyed they might have had their Petition of Right. They could not compel the Government to survey. It might have proved impossible to execute a survey. The Plaintiffs are not entitled to treat their money as lost, and to recover on that footing, while they retain the land orders and the power of selection; no substantial disadvantage was imposed on them by the later Act. Interest cannot be recovered on a money count, but the demand for it

ought to be based on a special count. There is no contract to pay interest.

In all the cases in which an obligation is expressly imposed on one party and not expressly imposed on another, but in which, nevertheless, damages have been recovered, there has been an implied correlative obligation. The Court will not impose impracticable obligations. The earlier Act only implies that the Government will not, by omission or commission, prevent the survey; will not by its own Act hinder the right of the Plaintiffs from arising: *Redhead* v. *Midland Railway Company* (1); *Sterling* v. *Maitland* (2); *Macintyre* v. *Belcher* (3). There is no warranty that there shall be a survey, but only an obligation to use all reasonable despatch. The declaration is bad on the face of it, unless there is such warranty, for it proceeds on the breach of such warranty. It does not state that the Government has been negligent, or incapacitated itself for doing what was intended. To say nothing of the declaration, there is not, on the facts, any breach of an obligation to survey.

As to failure of consideration: supposing the money and special counts thrown together, the Government ought to retain the deposit; meanwhile, the land orders are a valuable security. The Plaintiffs have no equitable ground until they offer to return those orders. Without any default of the Government, it became impossible, owing to the second Act, or otherwise, that the Government should do what was contemplated. The doctrine which prevails where performance is impossible, but there is no breach, is shewn by *Lord Clifford* v. *Watts* (4). Where there is no breach of obligation, interest is not allowed. From what date could interest run, if it were determined to give it? Not from any earlier date than that on which the Plaintiffs elected not to take the option of 320 acres under the amending Act. For simple failure of consideration you cannot recover interest on a count for money had and received. Where a day is fixed it runs from the day, where no day is fixed there must be a demand before there is a right of action: *Fruhling* v. *Schroeder* (5). The

(1) Law Rep. 4 Q. B. 379.
(2) 34 L. J. (Q. B.) 1.
(3) 32 L. J. (C. P.) 256.
(4) Law Rep. 5 C. P. 579.
(5) 2 Bing. N. C. 79.

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Respondent has not yet tendered his orders and demanded his money. The case of *Churchward* v. *The Queen* (1) was also referred to.

Mr. *Manisty*, Q.C., and Mr. *Bravo* (with whom was Mr. *Masterman*), for the Respondents:—

There was a contract between the parties, and there was nothing which rendered it impossible to perform it.

The preamble of the Act of 1862 contemplates the sale of land by private contract. The price, of course, was calculated with reference to the time when the purchasers might expect to get the land which was to compensate for loss of time and money. There was a positive obligation to survey.

The land, in fact, was surveyed, but owing to the disapprobation of some holders of Orders, of whom we were not, the place was given up, and an Act was passed putting it out of the power of the Government to fulfil its contract. If the government of a colony makes a contract and then passes an Act to prevent itself from keeping it, it is hardly fair to appeal to the principle that performance has been rendered impossible by act of law. What the Government offers is something quite different from the original terms. A statutory obligation is the most binding of contracts. Time was of the essence of the contract; the Appellants were under obligation to survey in time, and we were under no obligation to take what was offered us under the second Act.

Mr. *Cohen*, in reply:—

There never was an unconditional contract to survey. If there had been, still the performance of it was rendered impossible by the second Act, and that Act was not the act of the Government, but of the Legislature.

At the close of the argument the judgment of their Lordships was pronounced by

LORD PENZANCE:—

The merits of this case, so far as they relate to the main subject in dispute, appear to their Lordships to fall within a very narrow

(1) Law Rep. 1 Q. B. 173.

compass. The Respondents, under the powers of the *Northern Territory Act* of 1863, paid in the early part of the year 1864 certain large sums of money for the purpose of procuring land orders, which were to entitle them to grants of land in the colony. The *Northern Territory Act* had provided that 500,000 acres of the waste lands of the Crown, in country lots and town lots, might be sold by private contract at certain prices and according to certain conditions which were to be arranged and settled by regulations. Those regulations were published, and, after the publishing of them, the Respondents on the faith of them paid their money. The statute provided that, within five years from the date of the land order, land surveyed by the Government for the purpose should be allotted to each holder of such order, the holder being entitled to make his selection of the land so to be allotted, according to a system provided by the regulations. In point of fact, the five years passed away without any lands having been surveyed and placed in such a position by the Government that the purchasers had the opportunity of selecting from them. There were surveys made, to which it will be necessary to allude presently, but the matter, as originally contemplated under the Act of 1863, and the regulations framed under it, was never carried out so as to enable the purchasers to obtain their land under that scheme. At the close of the year 1868, before the five years had expired (for the five years did not expire from the date of the Respondent's land order until the 23rd of December, 1869), a second Act of Parliament was passed, the substance of which appears to have been that fresh regulations should be made, and that all who held land orders should obtain, not 160 acres of land for each order, but 320; the quantity of land, that is, was doubled, the price remaining the same, but the regulations which determined the mode of selection, and other details, were not similar under the second Act to what they had been under the first.

The purchaser, the Respondent, having been unable to obtain his land under the first Act during the five years, the substantial question which seems to their Lordships to arise on the merits of the matter is, whether in point of fact he was obliged to come in and select his land under the second Act. If any obligation was created upon him by the second Act to take his land under the new

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set of regulations, and in the manner provided by those regulations, his claim to recover the amount back could not in justice succeed. It appears to their Lordships that the entire language of the second Act is opposed to any such conclusion. The second Act treats it as a matter of option only, and goes so far as to say that if the holder of a land order does not come forward within nine months, and under his own hand agree to take the 320 acres instead of 160, he shall not be entitled to more than the 160; but there are no words to be found in that Act that impose upon a purchaser the obligation of taking land at all under the new Act or after the five years have expired.

The purchaser, then, not being bound to come in under the second Act, his right to recover his money is perfectly unquestionable. The consideration on which it was paid has failed; he was not able to obtain what he paid his money for, and he is entitled on failure of consideration to receive it back. So far matters are clear, and in argument they were not very strenuously disputed.

Then comes the question whether he is entitled to recover interest on his deposit. That question seems to depend upon whether in the form into which these proceedings have ultimately fallen, commencing as they did with a petition, but being afterwards followed out in the form of an action, it can be said with truth that the written documents, and the statute, and the payment of money under the statute, did or did not give rise to a contract such as is stated in the declaration. It is material to ascertain that, for the purpose of settling this question of interest, and for that purpose alone, because on the main matter, as has been already pointed out, his claim would arise equally upon the money count in the declaration. Now their Lordships are of opinion that the payment of money by the holder of a land order, coupled with the statute, did constitute a contract between these parties. The *Northern Territory Act* speaks of lots to be sold "by private contract at the prices and in manner hereinafter mentioned." It then speaks of the mode in which persons, authorized agents, are to offer these lots to be allotted to the public; and it then provides "That every preliminary land order, or land order issued under the preceding clause, shall entitle a purchaser, or his

transferee, within five years from the date thereof, to select from and out of the surveyed country lands in the said territory the particular lands of which he wishes to become the purchaser." Then it goes on to say that the Government Resident shall make a valid grant.

Now it has been contended that, inasmuch as neither the land order nor the Act says in so many words that the land shall be surveyed, the Court should come to the conclusion that there was no bargain on the part of the Government that it should be surveyed, and we are invited to look upon this contract as meaning, not that the Government shall survey the land, but that if they survey the land within five years, then the purchaser shall obtain his grant, and further, that they will use reasonable and due diligence to survey the land within that period. Their Lordships cannot concur in that view. Surveying the land is not a thing in itself which on the face of it ought to offer any insuperable difficulty. There is nothing, therefore, in the nature of the thing to lead to the conclusion that the Appellants intended to make the contract conditional upon the survey of the land. It is treated throughout both the Act and the land order as if the surveying was to be a matter of course. The surveying of the land lay wholly in the hands and power of the Government who received the money, and nothing was to be done or could be done by the purchasers in the matter. All contracts must be construed according to the surrounding circumstances, and a reasonable conclusion arrived at, as to what, looking at those circumstances, the parties intended. It does not seem to their Lordships to be a very reasonable or probable intention of the parties, that it should be an open question whether the land should be surveyed or not, and that if any difficulties should intervene to prevent the survey as early as intended, the contract should remain open for years, the purchasers being out of their money.

From these considerations the conclusion at which the Court has arrived is, that there was a positive contract on the part of the Government to survey the land within five years, to permit the selection by the purchaser, and, when selected, to make the grant. At the same time it may well be that the Government might, by the occurrence of some such events as have been shadowed forth in argument as being within the range of possibility, be exonerated

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from performing it. It is not necessary to pursue this suggestion, because their Lordships are of opinion, upon the facts and pleadings, that there is no trace of any such event.

Their Lordships are therefore of opinion that the purchaser is entitled to recover upon this first count, and, consequently, to recover the interest falling due for the number of years he has been kept out of his money, unless the matters alleged in the equitable plea formed any defence to that claim.

Their Lordships propose to consider that plea for a moment, as if it had been allowed to be pleaded, and not struck out. The substance of the plea is this, that a survey having been made in October, 1864, and therefore in plenty of time for the selection and grant of lands within the five years under the first Act, a large number of the holders of the preliminary land orders objected to the site at *Adam Bay* which had been selected by the Government surveyor. The words of the allegation are as follows: "And the Defendant further says, that numerous holders of preliminary land orders and their agents visited *Adam Bay* aforesaid, and the town or city of *Palmerston*, situate in or near *Adam Bay* aforesaid, the site chosen by the said *Boyle Travers Finnis* for the principal town of the said Northern Territory, and such numerous preliminary land order holders and their agents disapproved of the same site, and in or about the month of December, 1864, and January, 1865, gave notice of such disapproval to the Colonial Government of *South Australia*, and requested the said Colonial Government to have another site selected for the principal town of the said northern territory. And the Defendant further says that a great number of the preliminary land order holders held a meeting at *Adelaide* aforesaid, on the 10th day of January, 1865, which said meeting passed certain resolutions, that a committee, consisting of five of the holders of land orders in the northern territory, be appointed to prepare an address to the governor, requesting him not to allow the site of the settlement or of the capital to be decided on until a proper examination of the country has been made, and reported to, and approved by the governor and executive council, and to cause such examination to be made without delay," and so forth. "And the Defendant further says, that the said committee, appointed by the said meeting, presented an address to the governor of the said colony, the 18th day of

January, 1865, as follows:" and then follows the address. It then goes on to say that the Colonial Government being "desirous of giving the holders of preliminary land orders every possible satisfaction, and of having the chief town in a place approved of by the general body of holders of preliminary land orders, and also of having the chief town in the best possible place, if a better place than that selected by the said *Boyle Travers Finnis* could be found, and also of discovering, if possible, a better locality for the survey of the said country lands than that determined and chosen by the said *Boyle Travers Finnis,* and of having a further survey and exploration of the said northern territory, and believing that further exploration would result in finding a better site," and so forth, "and being influenced by the said disapproval of the said preliminary order holders and of the said meeting, and by the said address of the said committee, and especially by the request of *John McKinlay,* the agent for the Plaintiff hereinafter mentioned, determined not to approve of the site so chosen by him, and did not approve thereof, but disapproved thereof, and instructed the said *Boyle Travers Finnis* accordingly, and further instructed him to examine *Port Darwin,*" and so on. So that according to the statement in the plea, about the beginning of January, 1865, a large number of the holders of these orders had pointed out that the site was not a desirable one, and the Government had yielded to their suggestions, and determined not to approve the site, or adopt the survey. That was in the commencement of January, 1865.

Now, no doubt, if they had gone on to shew that the Respondents had been some of those who had urged this course upon the Government, the Appellant would have been a long way on the road towards establishing a discharge on the part of the Respondents from the obligation of the Appellants to make the survey in five years, if the result of abandoning that first survey was to preclude the possible making of the second survey within that period. But up to this point the plea contains no statement that the Respondents had any hand in the matter, except the averment that an active part in these representations was taken by "*John McKinlay,* the agent of the Plaintiffs hereinafter mentioned."

But, further on in the same plea, at the bottom of the page, there comes this statement: "The Defendant further says, that

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one *John McKinlay* was, by the Plaintiffs, in or about the month of March, 1865, made and appointed the agent of the Plaintiffs for the purpose of selecting their town and country lots." So that it appears on the face of the plea that *McKinlay* did not become the agent of the Defendants, or, at least, it does not appear that he did become their agent, until March, 1865, whereas the representations, and the yielding of the Government to those representations, took place in the month of January. Not only is there no allegation, therefore, that *McKinlay* urged the change of site as the agent of the Respondents, but, as far as appears on the plea, he was not agent for any purpose at the time when he so interfered. The rest of the plea carries it no further. It explains the circumstances fully. The substance is, that the Government chose, in the year 1865, listening to these representations, to abandon their survey, and although they afterwards commenced other surveys, the practical result was that there was no opportunity afforded for the purchaser to obtain his land within the five years. We are far from saying that the Government was not right in yielding to those representations. It was probably a right and proper thing to do, especially as the representations came from large bodies of the holders of land orders. But it does not follow that when the change was effected the holders of the land orders who had been no parties to it were bound by it, and precluded from adhering to their original bargain. The equitable plea, therefore, is no defence.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, with costs.

They desire to add a word with respect to the land orders. It is suggested now (though the point does not seem to have been suggested in the Court below) either, that the Respondents are not the holders of the land orders, or that, if they are the holders, they do not propose to give them up on being paid. It can hardly be conceived that that is the true state of the case, but their Lordships must express their opinion that, unless the Respondents are prepared to give the land orders up upon payment of the amount due, the Government ought not to satisfy this claim.

Solicitors for the Appellant: *Johnson & Co.*

Solicitors for the Respondent: *Masterman, Hughes, & Masterman.*

THE BALLACORKISH SILVER, LEAD, AND COPPER MINING COMPANY, LIMITED . . . . . } APPELLANTS;

AND

GEORGE WILLIAM DUMBELL RIDGWAY HARRISON AND MARY ANN BRIDSON, TRUSTEES OF THE WILL OF MRS. ALICE HARRISON . . . . . } RESPONDENTS.

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Nov. 18, 19;
Dec. 19.

ON APPEAL FROM THE COURT OF CHANCERY IN THE ISLE OF MAN.

Isle of Man—Waters—Rights of Crown—Injunction.

By an Act of *Tynwald* of the *Isle of Man*, a reservation was made to the lord of the isle (now represented by the Crown) of all such mines and minerals as then were, or at any time theretofore had been, vested in the lords of the isle.

The Queen, as lady of the isle, being thus possessed of the mines as of her own original title in the soil, has the right to the use of all waters found thereon, and percolating by natural processes into the mines when opened.

The holder of a mining lease from the Crown is not liable to make compensation for the withdrawal by percolation into his mine of water which would otherwise have flowed into, or having flowed into, would have been retained in the wells and springs of the superjacent land.

The Court of Chancery of the *Isle of Man* granted an injunction restraining *A.* from proceeding with his mining operations on the land of *B.* until he should give security, in the specified form, to meet such damages as *B.* might, on the hearing of the cause, be decreed entitled to recover for injuries done, or that might be done, to *B.'s* lands. *A.* gave security accordingly, but the Court ordered the injunction to be continued till the hearing of the cause.

Held, that the order for injunction was not justified by the practice of the Court.

THE Appellants in this case were an incorporated company, with limited liability, registered in *England* under the *Companies Act*,

* *Present*:—LORD PENZANCE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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1862. The registered office of the Appellants is situate in the City of *London*.

The Respondents, as trustees of the will of *Alice Harrison*, were proprietors and tenants, by tenure of customary freehold, of a certain farm called *Ballacorkish*, in the parish of *Rushen*, in the *Isle of Man*, which was occupied by their lessee.

The said farm is parcel and held of the manor of the *Isle of Man*.

Post 55, 61,

An Act of *Tynwald*, passed in 1703, assures to the customary tenants of the island their lands and rights, "Saving always unto *James* Earl of *Derby*, his heirs and assigns, and unto all and every other person and persons that shall at any time hereafter become lords of the said isle, all such royaltys, regalia, prerogatives, homages, fealtys, escheats, forfeitures, seizures, mines, and mineralls of what kind and nature soever, quarrys and delfs of flagg, slate or stone, franchises, libertys, priviledges, and jurisdictions whatsoever, as now are, or at any time heretofore have been, invested in the said *James* Earl of *Derby*, or in any of his ancestors, lords of the said isle."

The rights of the lord of the isle afterwards became vested in the Crown.

By an indenture of lease, dated the 22nd day of April, 1863, and made between the Queen's Most Excellent Majesty of the first part; the Honourable *James Kenneth Howard*, the Commissioner of Her Majesty's Woods, Forests, and Land Revenues, to whom the management and direction of certain parts of the land revenues of the Crown, including the land revenues in the *Isle of Man*, with the duties and powers appertaining thereto, had been assigned by order under the hands of two of the Commissioners of Her Majesty's Treasury on behalf of Her Majesty, of the second part; *Richard Yeates Brown Bush*, *William Ogilvie*, and *Joseph Tilston* of the third part; the said *James Kenneth Howard*, as such Commissioner and on behalf of Her Majesty, demised to the said *Bush*, *Ogilvie*, and *Tilston*, all and singular the mines, veins, and beds of mineral ores and minerals whatever, thereinafter called mineral substances, within, under, or upon all that tract or parcel of land containing by estimation 2133 acres, more or less, situate in the parish of *Kirk Christ Rushen*, in the *Isle of Man*,

as delineated on a plan annexed to the said lease. Messrs. *Bush*, *Ogilvie*, and *Tilston* were trustees for a company called the *South Foxdale Silver and Lead Mining Company*.

The lease was by deed, dated the 29th day of January, 1867, assigned by the said *Bush* and *Ogilvie*, the surviving lessees, to *Park Pittar* and *Moffat Crichton William Horne*, who by the deed declared that they held the said lease and premises thereby demised in trust for the Appellants.

By an indenture of lease, dated the 29th day of August, 1870, and made between the Queen's Most Excellent Majesty of the first part, the said *James Kenneth Howard* as such Commissioner as aforesaid of the second part, and the said *Park Pittar* and *Moffat Crichton William Horne* of the third part, the said *James Kenneth Howard* as such Commissioner as aforesaid, and on behalf of Her Majesty, demised and leased unto the said *Park Pittar* and *Moffat Crichton William Horne*, their executors, administrators, and assigns, all and singular the mines, veins, and beds of metal and metallic ores and minerals, thereinafter called mineral substances, within, under, or upon a tract or parcel of land situate partly in the parish of *Rushen* and partly in the parish of *Arbory*, in the *Isle of Man*, together with the lawful use of all roads, streams, and watercourses upon the same land, and full power and authority to search for, dig, and carry away all the mineral substances thereinbefore demised, or any of them, and to make and erect all necessary pits, shafts, buildings, and machinery, roads, and watercourses on the said land (so far as the said Commissioner could authorize the same), the said lessees, their executors, administrators, and assigns, making reasonable satisfaction and recompense to such persons, if any, as might be lawfully entitled thereto, for any damage which they might sustain by reason of the exercise of the powers thereby granted; to hold and enjoy the said premises thereinbefore demised unto the said lessees, their executors, administrators, and assigns, from the 10th day of October, 1869, for the term of twenty-one years, determinable as thereinafter mentioned, at the rent and royalties, and subject to the conditions, stipulations, and agreements therein contained.

By an indenture, dated the 26th day of January, 1871, and made between the Appellants of the one part and the lessees of

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the other part, it was declared and agreed that the lessees held the said lease in trust for the Appellants.

The farm called *Ballacorkish* is comprised within the premises which were demised by the two indentures of lease, and the Appellants carried on their mining operations under the lease beneath the farm of *Ballacorkish*.

On the 19th day of January, 1871, the Respondents filed their bill in the Court of Chancery in the *Isle of Man*, and thereby, after alleging that the Appellants had entered upon the complainants' lands and cut up the surface and deposited mounds of rubbish thereon, and done other damage to the Respondents' said lands at *Ballacorkish*, and that the Appellants had, by their workings, entirely dried up three watering-places on the Respondents' fields, used by them or their tenants for household purposes and for watering cattle, and diverted the water which was accustomed to flow to the watering-pool in the farmyard, and that by the means aforesaid the said farm was entirely deprived of all the spring water thereon, and that there was then no watering-place for the cattle of the Respondents' tenants on any part of the said lands; the Respondents prayed that the Appellants might be ordered to pay to the Respondents the sum of £400, or such sum as might be found due in respect of the injury done to the Respondents by the mining operations of the Appellants on the Respondents' said lands, and that the Appellants might be ordered to give security to be amenable to the Respondents, their heirs and assigns, for all damages which the Respondents might sustain by reason of the mining operations of the Appellants, or that the Appellants might be restrained from proceeding with such mining operations on the Respondents' said lands, and that in the meantime and until the final hearing of the cause they might be inhibited from proceeding with the said operations, and also praying an arrest against the Appellants and their effects until they gave security in the said sum of £400 to be amenable for the damages alleged to have been then already committed.

On the 26th of January, 1871, the chief constable, by virtue of the action of arrest in the cause, arrested a cargo of lead ore belonging to the Appellants, to be forthcoming to answer the decree or judgment of the Court.

On the 2nd day of February, 1871, an injunction was granted by the said Court restraining the Appellants from proceeding with their mining operations on the Respondents' said lands until they should give security in the sum of £300 to meet such damages as the Respondents might, on the hearing of the cause, be decreed entitled to recover for injuries done or that might be done to the Respondents' said lands. On the 14th day of February, 1871, a bond was given to secure the full amount of compensation which might thereafter be ascertained and awarded for the damages and injuries which might already have been done or that might thereafter be done to the Respondents' said lands and premises, or any of them, by the workings thereon by the Appellants, and thereupon the process of arrest which had been granted and carried into effect against the cargo of lead, was withdrawn and suspended.

The Appellants put in their answer to the said bill, and thereby alleged that the land used by them had been paid for, and that all damage done to the surface had been made good by the Appellants and at their expense, and denied the alleged injury to the water; and the Appellants alleged that the sum of £400 was much more than the purchase value of the land used by the Appellants, and the Appellants said that, under and by virtue of the aforesaid leases, they had full power to enter into any lands comprised within the said leases without being liable for the result of any of their mining operations underground, and to enter into and use any portion of the surface-lands comprised in such area on making a fair and reasonable compensation for the same; and the Appellants submitted that they ought not to be adjudged to pay the Respondents any damages, or to be inhibited from carrying on their mining operations, or to give security as prayed, and that they were not liable for the result of any mining operations underground, and ought not to be subjected to arrest of their goods for damages unascertained.

On the 8th day of May, 1871, the Appellants obtained the leave of the Court to put in, and they did accordingly put in, a supplemental answer to raise clearly the question whether the Court of Chancery of the *Isle of Man* had a right to grant an injunction against the Appellants as lessees of the Crown inhibiting them from proceeding with their mining operations until they gave

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security, and to question the right of landowners or tenants under whose lands Crown lessees have a right of extracting minerals, to obtain compensation for any damage sustained by them in the fair and legitimate working of the mines and raising minerals.

It appeared from the evidence that the Appellants had a right under their lease and by the custom of the island to excavate the land and break the surface for the purpose of mining; that some surface damage had been done by their mining operations, and that a custom prevails in the island for mining companies to make compensation in all such cases. It was also proved that a level which was driven by them underground struck a porous vein, and that the water in the wells had since greatly diminished.

On the 8th day of June, 1872, the cause was heard, and on the 4th day of July, 1872, a decree, dated the 8th day of June, 1872, was made by the Court declaring that the Appellants were by the custom of the isle liable to make compensation to the Respondents for the surface damage caused to the lands in the bill referred to by the mining operations of the Appellants, and also that the Appellants were liable to make compensation to the Respondents for the damage caused to the aforesaid lands by the Appellants sinking and working mines on the lands of the Respondents, and thereby interfering with their rights of water as complained of in the said bill, no custom to the contrary having been proved. And an issue was directed to ascertain whether any and what damage had been done by the Appellants to the lands of the Respondents, and, if any had been done, the jury was to assess separately the amount of surface damage done to the land, and the amount of damage (if any) done by interference with water.

No direction was given by the decree in reference to the security which had been given against future damage, or as to the injunction of the 2nd day of February, 1871.

The Appellants accordingly presented a Petition to the said Court praying that the said injunction might be dissolved. The said Petition was heard on the 17th day of October, 1872, when it was ordered that the said injunction should be sustained until the hearing of the cause on its merits, or until the same should be otherwise disposed of.

The Court, in giving its reasons for the decree of the 8th day of June, 1872, expressed its opinion that, although no custom to compensate for damage by interference with rights of water had been proved, yet that it must be assumed that persons working and raising minerals are liable to compensate for damage occasioned by interference with rights of water, when, as is here alleged, such damage has been caused by the sinking of shafts upon the lands of the complaining parties.

The appeal was brought from the orders of the 2nd day of February, 1871, and the 17th day of October, 1872, and called in question the said decree of the 8th day of June, 1872, so far as it declares that the Appellants are liable to make compensation to the Respondents for the damage caused to the said lands by the Appellants sinking and working mines on the lands of the Respondents, and thereby interfering with their rights of water, and so far as the said decree directed an issue to ascertain such damage.

The appeal now came on to be heard.

Mr. *Kay*, Q.C., and Mr. *Gell* (The *Attorney-General of the Isle of Man*) (with whom was Mr. *W. W. Karslake*), for the Appellants:—

The mining operations of the Appellants have probably caused damage to the wells, but there has been no violation of right. It was *damnum absque injuriâ*.

The Act of Settlement of 1703 (1) shews the rights which belong to the Crown, the lessor of the Appellants.

The Appellants have only worked old mines, and not taken new land. They have the mine and the right to work it, not doing any legal injury. There is no remedy, though I may do harm in exercise of a legal right. The damage for which compensation is given is that which results from a legal injury: *New River Company* v. *Johnson* (2).

Where mines and minerals are excepted they remain in the lessor. Where a right of property is thus reserved it is different from reserving a mere easement or servitude. In the *Isle of Man* the mines, as well as the minerals, are reserved, and the lord has the right to take minerals, making compensation for surface damage.

(1) *Supra*, p. 50. (2) 2 E. & B. 435.

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They are the absolute property of the lord, to be used in any way that he thinks fit: *Proud* v. *Bates* (1); *Duke of Hamilton* v. *Graham* (2).

By the word "mines" not merely the minerals but the place in which they lie is reserved to the lord as his own property, and there are no restrictive words. It is settled that a man may do that on his own land which may have the effect of draining wells in another person's land: *Acton* v. *Blundell* (3); *Cheeseman* v. *Richards* (4).

If the Appellants had been mining in land of their own, which was side to side with the Respondent's farm, their right to do what they have done could not have been questioned; and it ought not to be questioned because the mine is subjacent instead of being laterally adjacent.

No custom has been proved of giving compensation for draining off water; it is for the Respondents to prove such a custom. There can be no adverse usage of a thing invisible, such as percolating water.

The proceedings of the Court against the Appellants were irregular. No such proceeding should be taken, except where there is no property within the jurisdiction, which was not the case here. A jurisdiction is alleged in respect of debts not payable at present. We admit that there may be cases in which process of arrest has been used *ex parte*, but they have not been judicially sanctioned. Debt, even future, is ascertained; but who is to regulate the sum to be paid in an injunction suit? and how is it to be ascertained? In *England* the Courts grant an injunction only till the trial of the right to carry on the works. Where damages have been obtained against a party, and he is not able to pay, there may be an injunction.

There has been a Court of Chancery in the island from time immemorial, and there is no special case in which it acts on different principles from the Court of Chancery in *England*. It has certain statutory powers, but none relating to this subject. The Court of Chancery of the *Isle of Man* is a Court of Law and Equity. If the Defendant is resident on the island mesne process prior to

(1) 34 L. J. (N.S.) (Ch.) 406. (3) 12 M. & W. 324.
(2) Law Rep. 2 H. L., Sc. App. 167. (4) 7 H. L. C. 349.

investigation cannot issue against him unless there be an affidavit that he is about to leave the island. The injunction means that the company is restrained from working until it gives security. It was a foreign corporation, *i.e.* foreign to *Man;* but the company at least possessed its mining property and ore in *Man.*

Taking it to mean that the security should cover not all damage to be done at any time, but only the damage which might be done up to the time of trial, that is equally illegal.

The applicant ought at least to have given security before such a step was taken. Even trespass is not ground for an injunction unless to prevent irreparable damage. The Court never stops a trade by injunction, especially where no wrong proved. For damage actually done there may be an arrest of property, but not for prospective damage. After all, when the accounts are taken it might turn out that no damage had been done.

The injunction is such as the Court of Chancery in *England* could not issue: *Salmon* v. *Randal* (1); and it is impossible that the Court of Chancery of *Man* can possess such a power. We were compelled to obey, and to give security, for the works were stopped; the mine would have been destroyed if we had not submitted. The order containing the injunction of the 18th of October, 1872, is bad, for the injunction had ceased by the giving of the bond.

Mr. *Manisty*, Q.C., and Mr. *Everitt*, for the Respondents:—

Cases between adjoining lateral proprietors are not authorities in a question between these tenants and the lord as to operations conducted on the same land. As between the lord and a copyholder, the lord is to be presumed to have granted the land to the copyholder with the benefit of all streams. Even an express reservation would not give a right to destroy streams and rivulets; a custom to do so would be bad: *Duke of Hamilton* v. *Graham* (2) and other Scotch cases of a grant out of which something was reserved, were mere cases of contract, not of tenure.

This is copyhold or customary freehold. It is recognised by the Act of Settlement, not created by a new bargain. The right to work mines is not mentioned in the reservation, so that a custom

(1) 3 My. & Cr. 439. (2) Law Rep. 2 H. L., Sc. App. 167.

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must be proved, and must be reasonable. The customary right is to work mines, paying for the damage done. The Appellants want to alter the meaning of the word "damage."

In the Act of Settlement the lord does not rely on contract, but falls back on old rights and privileges. A grantor derogating from his own grant must shew express authority. The lord having granted the surface to the Respondents as customary tenants, cannot lawfully derogate from his own grant by so working the mines as to inflict damage of this description on the tenants. The Act of Settlement recognises such royalties "as now or heretofore," &c.; the custom therefore, if any, must be older than the Act of Settlement, otherwise the miners may destroy every spring in the island without compensation. All is to be taken in favour of the grantee and against the grantor. The Crown here represents the Earl of *Derby*, who was only lord of the manor, and is not entitled to the favourable presumptions which the Crown itself can claim. The Crown could not enter and could not give licence to others to enter. A custom to compensate for all surface damage is established. Damage to springs and wells at or near the surface is in fact surface damage; that particular form of damage not having arisen before, the Respondents have not been able to shew that it has been paid for, but it was for the Appellants to prove that the custom does not extend to wells. The Appellants cannot now complain of the injunction. The arrest of lead ore was for £400, and the injunction bond is for £300, a less sum. The Appellants accepted discharge of the arrest, and gave security for £300. Where there is equitable jurisdiction, as in waste, we may ask for an injunction, and also ask for security.

The decree actually made was correct. It was something like a *ne exeat* in the English Courts. The process in *England* is severe against foreigners; and this company was foreign to the *Isle of Man*. The Court could arrest property as a material guarantee. The Appellants had a right to an action if they had been treated with excessive rigour. The Appellants gave their bond, and got release of the lead ore. The injunction has been so far complied with, and it is too late to appeal.

Where a Judge at common law makes an order which is perhaps irregular, but which is coupled with some provision that is bene-

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ficial to a party, he cannot take the benefit of such provision and appeal against the order.

The following cases were also referred to: *Bonomi* v. *Backhouse* (1); *Humphries* v. *Brogden* (2); *Hilton* v. *Lord Granville* (3); *Bowser* v. *Maclean* (4); *Lord Cardigan* v. *Armitage* (5); *Dickinson* v. *Grand Junction Canal Company* (6); *Bourne* v. *Taylor* (7); *Duke of Portland* v. *Hill* (8); *Whitehead* v. *Parks* (9); *Duke of Buccleuch* v. *Wakefield* (10); *Hen* v. *Gibb* (11); *Bell* v. *Wilson* (12); *Rowbotham* v. *Wilson* (13); *Blackett* v. *Bradley* (14).

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Their Lordships' judgment was now delivered by

LORD PENZANCE:—

The Appellants, under a lease from the Crown, have entered upon lands occupied by the Respondents, have sunk shafts, or enlarged shafts already sunk, and worked the mines there.

The Respondents filed their bill of complaint in the Court below complaining of two distinct species of damage—first, the damage done to the surface by depositing spoil from the mine upon it; and second, the damage done to three several springs of water which existed in their land, and which they used for farm purposes.

They also complained in their bill of the entry by the Appellants into their land and breaking the surface for the purpose of mining; but this, it was proved in the Court below, the Appellants had a right, under their lease and by the custom of the island, to do; and the Court below have practically affirmed this right, nor is it in question now.

The Appellants by their answer denied the Respondents' claim both for damage to their springs of water and damage done to the surface by depositing the spoil upon it.

(1) 9 H. L. C. 503; S. C. 8 L. J. (N.S.) 181.
(2) 12 Q. B. 739; S. C. 20 L. J. (N.S.) (Q.B.) 10.
(3) 5 Q. B. 701; S. C. 13 L. J. (N.S.) (Q.B.) 193.
(4) 2 De G. F. & J. 415; S. C. 30 L. J. (N.S.) (Q.B.) 273.
(5) 2 B. & C. 197.
(6) 7 Ex. 282.
(7) 10 East, 189, 202.
(8) Law Rep. 2 Eq. 777.
(9) 27 L. J. (N.S.) Ex. 169; 2 H. & N. 870.
(10) Law Rep. 4 H. L. 377.
(11) Law Rep. 2 Ch. 699.
(12) Law Rep. 1 Ch. 303.
(13) 8 H. L. C. 348.
(14) 1 B. & S. 940.

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But this latter claim was clearly proved by the evidence to be in accordance with the custom of the island, and the Appellants do not now in appeal contend that they are not liable for it.

The question, therefore, is narrowed to the point whether, upon the general principles of law applicable to their respective positions, or upon the custom of the island, the Appellants are responsible for the damage done to the springs.

The Court below has by its decree decided this question in the affirmative, and has accordingly directed an inquiry by a jury as to the quantum of damage sustained under this head.

The present appeal calls in question the principles on which that decree proceeded, and raises a controversy of very general interest and very wide range; for the damage complained of is the withdrawal by percolation into the mine of the Appellants of water which, it is averred, would otherwise flow into, or having flowed into, would have been retained in the wells or springs on the Respondents' land; and such percolation of water is so common an incident of mining that any legal liability attaching to it cannot fail to be fraught with serious consequences.

The facts that give rise to this legal question in this case are these. A new level was driven by the Appellants under the Respondents' land about two years ago, and from that time the wells and springs were dried up.

This level appears to have been worked at a considerable depth below the springs, being at the depth of twenty-five fathoms, or 150 feet below the surface, at or near the part where the springs lay; but it was said by one of the witnesses to have struck a "porous vein," and the contemporaneous failure of water in all the wells was the apparent result.

In this state of things it is convenient to consider the legal rights of the parties in the first place, independently of any custom.

If the litigant parties had been the respective owners of two adjacent closes, and one of them, mining in his own land, had drawn off by natural percolation through the soil the water which fed a spring or well on the land of the other, there would have been no question to discuss; for the cases of *Acton* v. *Blundell* (1) and *Chasemore* v. *Richards* (2) have affirmed conclusively this proposition

(1) 12 M. & W. 324. (2) 7 H. L. C. 349.

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—that the disturbance or removal of the soil in a man's own land, though it is the means (by process of natural percolation) of drying up his neighbour's spring or well, does not constitute the invasion of a legal right, and will not sustain an action. And further, that it makes no difference whether the damage arise by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well; or whether, having found its way to the spring or well, it ceases to be retained there.

But here a distinction was drawn in argument. It was said that the relations of the two parties in this case are not similar to those of two strangers in title occupying adjacent closes; for that the Appellants represent, through the Crown, the lord of the manor, and the Respondents are customary tenants of the manor; and that the lord, having granted the surface to the customary tenants, could not lawfully derogate from his own grant by so working the mines as to inflict damage of this description on the tenants.

This reasoning, whatever weight attaches to it, appears to apply to the present case; but the Respondents' argument admits of a more cogent answer.

The Court, in both the cases cited, dwelt upon the extreme difficulty, if not impossibility, of pursuing the courses of this natural percolation of water, so as to bring together cause and result with that reasonable degree of certainty which ought to attend the enforcement of a legal right, and relied upon this difficulty as a prominent reason for declaring damage of this description to be *damnum absque injuriâ*.

The mutual rights of the lord and the tenants of the manor were finally settled and adjusted by the *Act of Tynwald* in 1703. That Act recited that disputes had arisen as to these mutual rights, and that the Act was passed with the consent of both parties to put an end to all such disputes.

After assuring to the customary tenants their lands and rights, the Act expressly excepts in favour of the lord all "mines, minerals," &c. The words are:—[His Lordship here read the words of the Act (1).] The lord's right to the mines and minerals, it is to

(1) *Supra*, p. 50.

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be observed, is affirmed by way of exception; it is affirmed to have been excepted out of the thing granted. It is not, therefore, a mere liberty to work the mines which the lord has; but the Act affirms that he has excepted out of the grant not only the minerals, but that portion of the soil which contains the minerals, and which constitutes the "mine."

The legal effect of such an exception is undoubted; it was commented upon by Lord *Hatherley* in the case of *Proud* v. *Bates* (1). "There is no doubt," he says, "but that the mines are altogether out of the demise; and never having been demised or parted with at all, the Defendants are at liberty to use them as they think fit." The rights of the lord or grantor in such cases are further illustrated and explained in *Duke of Hamilton* v. *Graham* (2).

If, then, the lord is thus possessed of the mines as of his own original title in the soil, he has all the rights incidental to that ownership, and among others he has the right to the use of all waters found thereon and percolating by natural processes into the mines when opened. He may apply such waters too in any way he pleases, or he may simply remove them and cast them away. And the question is, whether in exercising a right thus incident to the ownership reserved to him he is derogating from anything which he has, expressly or by necessary implication, granted to the tenants of the manor.

Express grant of these springs for the use of the tenant, of course, there is none; and as these particular springs are not shewn to have been in existence at the time of the Act of 1703, it is not easy to see how it could be implied that they individually were then or at any previous time granted.

If such a grant could be implied at all therefore, it could only be so as part of the general ownership and dominion of the surface, which carries with it, no doubt, the right to the use of the water falling upon it, or rising there in the form of a spring, or at any time found upon it. But the same thing is true, as has been just pointed out, of the ownership of the mines.

How then are these respective rights to be reconciled? They

(1) 34 L. J. (N.S.) Eq. 411. (2) Law Rep. 2 H. L., Sc. App. 167.

cannot, in a legal point of view, be distinguishable from those of the owners of adjacent portions of the same close, the only difference being that the former are adjacent vertically instead of laterally.

The case may therefore be put of the owner of a piece of land who has parted by grant with a portion of it and retained the rest.

Now, it is obvious that the respective rights of the grantor and grantee in such a case can only be upheld so long as the distinction is maintained between a right to use and appropriate the water which the soil from time to time affords, and a right to have the flow of that water in the soil preserved without disturbance.

In what respect, then, do their rights differ from those of the owners of adjoining closes, who are strangers in title, each of whom is entitled by law to the water found upon his land, but neither of whom is entitled to complain of the loss of that water by natural percolation set in action by his neighbour's excavations.

It appears to their Lordships that the two cases are substantially identical, and that the same law must govern both. The grant of the surface cannot carry with it more than the absolute ownership of the entire soil would include.

That absolute ownership is held not to include a right to be protected from loss of water by percolation into openings made in the soil of a neighbouring owner. How, then, can the grant of the surface only be held to include such a protection?

To hold otherwise might not improbably result in rendering the reservation of mines and minerals wholly useless. Percolation of water into mines to some extent is an almost necessary incident of mining. And if the grant of the surface carries with it a right to be protected from any loss of surface water by this percolation, the owner of the surface would hold the owner of the mines at his mercy, for he would be entitled by injunction to inhibit the working of the mines at all.

It is not at variance with this view that the case of *Whitehead* v. *Parks* (1) was decided, because in that case there was a lease and a distinct grant of the injured springs *eo nomine*, and the

(1) 2 H. & N. 870.

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injury was the act of one who claimed under the lessor, so that the question resolved itself into the meaning and construction of the words used in the lease, and did not depend on the rights to be assigned by the law to persons standing in certain relations of title to one another, the Court holding that by the terms of the lease the lessor had so far assured to the lessee the continuance of the springs in question that he could not lawfully, by any act of his own, diminish them.

There remains the question of custom. This is a question of fact.

It was argued that the custom proved was wide enough to include the damages done to the springs of water, and that damage to the springs was in fact damage done to the surface of the land at or near which the springs were found, or if not, then that the custom was really a custom to compensate for damage generally, and that proof of compensation made for damage to springs was only wanting because that particular form of damage had not previously arisen.

Their Lordships cannot concur with either contention. The Court below has found as the result of the evidence that a custom existed "to compensate for surface damage that may be done to the land," but that "no custom to compensate for damage by interference with rights of water has been proved."

No further definition is given of what is intended by "surface damage done to the land," but the words are plainly used in contradistinction to "damage by interference with rights of water," in respect of which it was said no custom was proved.

It is therefore impossible, their Lordships think, to hold that the Court below intended, when speaking of "surface damage," to include damage done to the springs.

Nor would the evidence justify such a conclusion.

For there is not a single witness who even alludes to a claim ever having been made in respect of such damages, still less acceded to—although it can hardly be the case that mining should have been carried on to any extent in the island without giving rise to damage of this description.

Be this as it may, their Lordships are of opinion that a custom

to compensate for a species of damage which does not fall within the ordinary definition of legal damage, and which is not *ejusdem generis* with that of which proof was given, needs for its establishment at least some direct proof of its existence, and ought not to be inferred from the fact of ordinary damage to the surface of the land in the legal sense of the words having been always paid for.

In the result, therefore, their Lordships will humbly advise Her Majesty, that this appeal should be allowed; that the decree of the 8th of July, 1872, should be varied by omitting so much of the same as declares that in the opinion of the Court the Defendants are also liable to make compensation to the Complainants for the damage caused to the aforesaid lands by the Defendants sinking and working mines on the lands of Complainants, and thereby interfering with the rights of water as complained of in this bill, and as directs the jury to estimate and assess the amount of damage (if any) done by interference with water; and by declaring that the Plaintiffs are not entitled to compensation for such last-mentioned damage. And that the order of the Court for an injunction should be reversed as not being justified by any established practice of the Courts in the *Isle of Man*, and contrary to the practice of the Courts in *England;* but that the bond, which appears to have taken the place of the arrested goods, should remain in force, and that the Appellants are entitled to their costs.

Solicitor for the Appellants: *Horace Watson.*
Solicitor for the Respondents: *Thomas Johnston.*

J. C.* 1873 Nov. 27, 29; Dec. 9.

WILLIAM MUIR, GEORGE BARCLAY MUIR, AND JAMES MUIR . . . . . } APPELLANTS;

AND

JAMES MUIR . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH (APPEAL SIDE) FOR THE PROVINCE OF QUEBEC, CANADA.

Law of Lower Canada—Alimentary Allowance—Compensation.

The rule of law in *Lower Canada* that a debt due from the estate of a testator in respect of an alimentary allowance given by his will is incapable of being the subject of compensation or set-off, applies even in the case where the donee of the alimentary allowance is an executor and trustee of the estate.

The law of *Lower Canada* does not recognise the distinction between Law and Equity which prevails in *England*.

The right to "rapport" or "return" is simply an incident to a partition.

Where a person who is indebted to an estate is entitled to receive by way of alimentary allowance an aliquot portion of the net revenue of the estate; it is erroneous to reckon as part of such revenue the interest due from such person on his debt.

THIS was an appeal from a judgment rendered on the 9th of September, 1870, in favour of the Respondent, with costs, in a cause in which the Respondent was Plaintiff, and the Appellants, in the qualities and capacities of executors and administrators of the last will and testament of *Ebenezer Muir*, deceased, late of *Montreal*, were Defendants.

The Respondent, *James Muir*, was at the same time one of the Appellants *ès qualités*, and the three, *William Muir*, *George Barclay Muir*, and *James Muir*, were sons of *Ebenezer Muir*.

On the 23rd of May, 1857, *Ebenezer Muir* made his will, and after a certain devise and bequest therein to his wife, Dame *Jane Steel*, devised and bequeathed as follows:—

"And all the rest, residue, and remainder of my property real and personal, moveable and immoveable, ready moneys, rights,

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

actions, right of action, debts, claims, and demands generally whatsoever, which at the time of my death may be owned by or belonging to me, or to which I may then be entitled, whatever may be the amount, value, or description or situation thereof, without any exception or reservation whatsoever, I give, devise, and bequeath in trust unto my beloved sons *William Muir*, *George Barclay Muir*, and *James Muir*, the survivor or survivors of them, that the said trustees shall reduce the same into their possession without delay."

He then directed the trustees to pay certain expenses, and out of the then net annual proceeds to pay a certain annuity to his wife, and gave directions as to the duties of the trustees in the terms following:

"It shall be the duty of the said trustees, ... the remainder of the said annual revenue to divide and pay to the whole of my children, issue of my marriage with the said *Jane Steel*, or their lawful issue surviving, share and share alike *par souche* yearly and and every year by quarterly payments until the youngest of my grandchildren shall have attained the age of majority, and upon the accomplishment of the majority of my youngest grandchild the whole of the immoveable part of my estate, rest, residue, and remainder thereof shall then be sold, and as soon as my entire estate can be converted into cash the same shall be divided between the said children who may then be alive, or their lawful issue representing them, in full property, share and share alike, *par souche*, in the order in which successions are divided in this country.

"And I do hereby declare it to be my will and desire that the revenue of my estate is bequeathed and intended to be bequeathed unto my beloved wife and children, and the lawful issue of the latter, as an alimentary allowance or pension, until the accomplishment of the majority of my youngest grandchild as aforesaid, and the said alimentary allowance shall not be sold, mortgaged or made away with by anticipation by them, or either of them, nor shall it be subject to seizure or other contingencies to which personal or other property is subject, but shall be paid to them only as an alimentary allowance. . . . .

"And it is my wish and desire that in the event of any one or

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more of my children dying unmarried, or dying married, but without issue, or such issue predeceasing themselves, the share of the party so dying, either in the revenue or capital, shall revert and fall into the mass of my estate, and be divided between the survivor or survivors of them, or their lawful issue as aforesaid, share and share alike.

"And it is my will and desire that my dear son *William Muir* shall assume the chief management of my estate, and that he shall have and be entitled to a sum of money equal to 2½ per cent. for his trouble from time to time, and in the event of the death of the said *William Muir*, or in the event of his refusing to act, then and in such case his successor as chief manager shall then be appointed by a majority of those interested in my estate who are of age at the time of such nomination.

"And to execute the present my last will and testament I do hereby name and appoint as executors the said trustees, or the survivor or survivors of them, to whom I give the amplest authority in that respect, and to continue in office as executors and administrators even beyond the day and year limited by law, into the hands of which said *William Muir*, *George Barclay Muir*, and *James Muir*, to whom I hereby divest myself according to law."

Jane Steel died before her husband.

Ebenezer Muir died on the 12th of January, 1866.

Upon his death, ten parties became entitled to share in the division of the annual revenue under the will, and at the time when this suit was commenced his youngest grandchild had not attained majority.

At the death of their father, five of the heirs, and among them the three executors and trustees, were directly indebted to the estate for money advanced by him to them to the amount altogether of $18,650, of which the direct debt of *James* the Respondent was $2200; and besides these debts *George Barclay* and *James* the Respondent were indirectly liable to the estate upon accommodation indorsements of their father, *George Barclay* being thus liable to the amount of $4125, and *James* being thus liable upon fifteen promissory notes of $350 each, drawn at different times

by him to the order of and indorsed by his father, and running and unpaid at his father's death.

The direct debt of *James*, the Respondent, was due upon a promissory note made by him on the 1st of January, 1862, for $2200 payable thirty months after date, with interest at 7 per cent. per annum, payable semi-annually, which having come to maturity in July, 1864, was not then paid by him, and remained unpaid at his father's death.

Similarly, as shewn by their father's ledger, the direct debts of the other two trustees had been contracted some time before his death.

These direct debts were entered in their father's ledger among the assets of his estate.

After his father's death, *James*, the Respondent, paid six of the above fifteen promissory notes, leaving the estate liable for the remaining nine notes.

On the 7th of April, 1866, a meeting of the three trustees was held, at which a minute was signed by them reciting the liability of the estate on those promissory notes (to the amount of $3150), and continuing thus:

"And whereas *James Muir* has declared and does hereby declare his inability to pay the aforesaid notes, it is hereby resolved that the notes aforesaid now already past due and protested be taken up and paid by the estate, and those not yet due of the above, after being protested, be also paid by the estate, and the amount paid on the aforesaid *pro.* notes and costs be held as a claim against the said *James Muir*, upon condition of signing an agreement to pay interest at the rate of 7 per cent. per annum quarterly, on the amounts paid by the estate on the aforesaid notes."

These notes were paid by the managing executor, *William Muir*, for the estate.

On the 10th of October, 1866, another meeting of the three trustees was held, at which it was resolved that the quarterly divisions of the revenue of the estate required to be made up by the will should be made up on the first days of June, September, December, and March, and should include all moneys received on

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account of revenue during the preceding three months, after deducting disbursements, charges, &c.

On the 4th of July, 1867, another meeting of the three trustees was held, at which the following resolution was agreed to, and signed by *William* and *George Barclay*, and objected to by *James*, the Respondent:—

"It being thought best for the interest of the estate of *E. Muir* that the moneys owing to the estate should be called in as soon as possible, it was resolved that the instalments out of the revenue coming to the heirs owing money to the estate be retained to go to their credit in payment of the principal sums owing by the said heirs or their husbands."

The share of each heir for quarterly allowance was made up by *William Muir* as managing director upon the full revenue from all sources, interest being added upon the debts of the heirs, including the Respondent, and considered as part of the actual receipts of the estate, and expenses being deducted; and accordingly in the accounts *William Muir* charged the Respondent with interest and credited him with the instalments of quarterly allowance when due.

The instalments coming to the Respondent down to the 1st of June, 1868, included, were, with his consent, retained in part payment of the interest and capital due by him to the estate, whereby his debt was reduced to $5200·20 at that date.

Previously thereto, on the 18th of February, 1868, the Respondent executed a deed of assignment under "the *Insolvent Act* of 1864," of *Lower Canada*, to *T. S. Brown*, the official assignee, and annexed a schedule, containing a list of his liabilities. His liability to his father's estate was not inserted by him in this list, nor did the Appellants, though aware of this assignment, file any claim upon him in respect thereof.

On the 31st of March, upon his own petition, the Court discharged him from all his debts and liabilities existing at and previous to the date of the assignment under the provisions of the above-mentioned Act.

After the 1st of June aforesaid, and before the commencement of this suit, three quarterly instalments, accruing respectively on

the 1st of September, 1868, the 1st of December, 1868, and the 1st of March, 1869, came to the Respondent, and were retained and put in the accounts by *William Muir* to the Respondent's credit against the interest and capital owing by him. The total amount of these instalments was $458, and of this amount $269·98 was credited to him against interest, $124·22 was credited to him against capital, and the remaining $63·80 was put against the premium on a life policy which he had transferred to the executor as a further security for his debt to the estate.

This suit was instituted by the Respondent on the 14th of April, 1869, for the recovery of these three instalments with interest.

The Respondent, on the 4th of May, 1869, filed his declaration, and therein stated that the youngest grandchild of the testator had not yet attained majority, that under the will he was entitled to an alimentary allowance, payable quarterly, of one-tenth part of the net revenue of the estate of his father, after payment of the charges constituted by the will, and that the Appellants admitted the amounts of three quarterly payments, being the three instalments already mentioned, but refused to pay them, and by reason thereof were indebted to the Respondent in the sum of $458, and he therefore prayed that the Appellants might be jointly and severally adjudged and condemned to pay the Respondent the said sum with interest on the said three quarterly payments respectively.

The Appellants pleaded, first, a plea of compensation in which they insist (among other things) that it was not the intention of the testator that the Respondent, being named one of the trustees to whom the estate was bequeathed, and one of the executors of the will, should be entitled to participate equally with the testator's other children in the revenue of the estate, while his indebtedness created after the making of the will remained undischarged, and the moneys paid out for him by the Appellants, after the decease of the testator, were not refunded.

That the Respondent, by accepting the trusteeship and appointment of executor, could not claim personally from the Appellants any legacy under the will while there existed a much larger indebtedness on his part to the estate.

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That the intention of the testator was to exempt the annual allowance made to his children from transfer and assignment to strangers only, and not to free it from any charge or lien the executors might have on it for indebtedness to the estate.

And therefore the Appellants prayed that the shares claimed by the Respondent in the annual revenue of the estate of the late *Ebenezer Muir* should be declared to have been compensated by the larger sum of $5201·29, due by the Respondent to the Appellants.

The Appellants secondly pleaded a plea of rapport, which was in effect that the Respondent was bound to bring the alleged debt into hotchpot before receiving the alimentary income; thirdly, a plea of payment; and fourthly, a general denegation or traverse.

The Respondent answered and replied in effect:—

First. A general answer; Secondly. Replication to the effect that the claim of the Appellants to retain the alimentary allowance of the Respondent on the ground of compensation or rapport was unfounded in law and contrary to the testator's intention; Thirdly. The Respondent's insolvency and discharge; and Fourthly. Facts intended to shew that the alleged debt was due not from the Respondent, but from the Appellant *William Muir*.

The Superior Court for *Lower Canada*, held at *Montreal*, on the 30th of November, 1869, gave judgment in the action, and declared that in the opinion of the Court the Respondent was not bound to suffer the compensation claimed by the Appellants, and was not bound at the time then present, and so as to vacate or diminish his claim in the said cause, to make the rapport claimed by the Appellants by reason of the Respondent's indebtedness to the estate of his late father: and condemned the Appellants jointly and severally to pay and satisfy to the Respondent the sum of $458 current money of *Canada*, which had accrued due at the several times in such judgment set forth, together with the several sums of interest therein specified, and with costs of suit.

From this decision appeal was made by the Appellants to the Court of Queen's Bench for the province of *Quebec, Canada*.

In their factum, filed on the 14th of February, 1870, they contended:

First. That they were named by the will trustees and executors

for the administration of the testator's estate, and were directed, after the payment of certain legacies, to divide the net revenue among the legatees; that therefore the action which the legatees would have against the executors was in the nature of an action *en partage*, and consequently subject to the same rules; and before the Respondent could enforce a partition, he was bound to return into the estate all the sums in which he was indebted.

Secondly. That the principle of division contended for by the Respondent was inconsistent with the equality among the legatees intended by the will, for according to him the value of the whole estate being estimated at $80,000 dollars, and five of the legatees owing $28,000, more than a third of the whole, the five, without bringing in this third, were to share equally with the rest in the revenue.

Thirdly. That the Respondent, in order to enjoy the legacy made to him, must come to the testamentary succession of the late *E. Muir*, and consequently be one of the heirs under Article 597 of the *Civil Code*.

Article 597. "Abintestate succession is that which is established by law alone, and testamentary succession that which is derived from the will of man. The person to whom either of these successions devolves is called heir."

That the fact of the bequest of the tenth share being limited for a period to the revenue made no difference, the bequest being as perfect a bequest of an equal share in the succession as was made to any of the other heirs, and that therefore the Respondent was bound to make return according to the express provisions of the code.

Article 700. "Each co-heir returns into the mass, according to the rules hereafter laid down, the gifts made to him and the sums in which he is indebted."

Article 712. "Every heir, even the beneficiary heir, coming to a succession, must return to the general mass all that he has received from the deceased by gift *inter vivos*, directly or indirectly; he cannot retain the gifts made nor claim the legacies bequeathed by the deceased, unless such gifts and legacies have been expressly given him by preference and beyond his share, or with an exemption from return."

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Article 718. "Return is only made to the succession of the donor or testator."

Article 719. "Whatever has been laid out for the establishment of one of the co-heirs or for the payment of his debts must be returned."

Fourthly. They contended that the Respondent, having accepted the appointment of trustee and executor, became vested as such with every amount in which he was indebted to the estate; and that therefore the qualities of debtor and creditor meeting in him, confusion or compensation necessarily took place, and that he could not recover from his co-executors his full share in the revenue without accounting to them for the amount he held, or the interest thereon.

They claimed, therefore, that the Respondent should be held to return into the estate the sum of $5201·29, with interest, before being allowed to enter upon the enjoyment of his share of the succession.

The Respondent in his factum, filed on the 21st of February, 1870, relied on the terms of the testator's bequest to his children of the alimentary allowance already set out, and contended:

First. That compensation could not take place upon a claim for *alimens*, quoting in support of his contention Article 1190 of the *Civil Code*.

Article 1190. "Compensation takes place whatever be the cause or consideration of the debts, or of either of them, except in the following case. . . . . (3.) A debt which has for object an alimentary provision not liable to seizure."

Secondly. That the existence of debts by the Respondent and other children to their father before his death, and the fact of no charge having been made by him in respect thereof upon the alimentary allowance in his will, shewed his intention to form for his heirs a capital free from liability.

Thirdly. That the Appellants as executors were not entitled to demand return (rapport) from him as a legatee. For this proposition he quoted Article 723 of the *Civil Code*.

Article 723. "Returns are due only from co-heir to co-heir, they are not due to the legatees, nor to the creditors of the succession."

Fourthly. That return, if enforceable, could not be enforced till the time of final division fixed by the will.

Fifthly. That the argument of the Appellant that he had consented to the retention of his allowance for the payment of his debts was untenable, as he could not alienate his allowance.

Sixthly. He relied on the proceedings in insolvency and the order of discharge.

On the 9th of September, 1870, the said Court of Queen's Bench affirmed the judgment of the Superior Court, with costs against the Appellants.

The judgment of the Court of Queen's Bench was delivered by Mr. Justice *Badgley*, and was concurred in by all of the five Judges of the said Court before whom the case was heard. The judgment contained the following passages:—

"With reference to the facts set out in the pleas of the Appellants in support of their pleas and factum here submitted, they contain averments of the principal facts above mentioned as to the Plaintiff's indebtedness to the estate to the amount stated of $5201.20, which it would be useless to repeat; and further aver that in making the Plaintiff a trustee and executor the testator did not intend his participation in the net annual revenue whilst he continued indebted to the estate, nor during such continuance intended to exempt his share of the revenue from lien or charge upon it until his debt was paid, and that until that event the Plaintiff could not claim to be paid his share or allowance, which the Appellants were entitled to apply by compensation in deduction of his debt until his final payment.

"Now it is not denied that the testator was fully aware of the Plaintiff's indebtedness to himself for several years previously to and up to the time of his decease. His private ledger filed by the Appellants, made up by the testator to the year of his death, established the fact clearly, and yet, notwithstanding, he did not alter his will, which contained the mentioned provision for his children, including the Plaintiff, making them the equal participants, share and share alike, in the net annual revenue of his estate by quarterly payments, and which also contained his express declaration and will to be "that the said revenue was bequeathed and

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intended to be bequeathed as an alimentary pension or allowance not to be sold, mortgaged, or made away with by anticipation by them or either of them, nor subject to seizure or other contingencies to which other personal or other property is subject, but shall be paid to them only as an alimentary allowance.

"The intention of the testator averred in the Appellants' pleas is entirely gratuitous and unfounded, and altogether in contradiction to the plain and precise intention declared by his will. It is also incontestable that the law not only sanctions, but expressly favours bequests of property for aliment, and not only frees it from liability from seizure for the debts of the legatee, but also from compensation. In 1st vol. *Ancien Denizart, vo. Alimens*, p. 457, s. 8, it is said: '*Les lois attachent une très-grande faveur à la cause d'alimens,*' &c.; s. 9, art. 8, '*Les lois et l'usage ont introduit plusieurs priviléges tendant à conserver les alimens à ceux à qui ils sont dus, soit par la disposition de l'homme, soit par la disposition de la loi. Celui qui veut donner ou léguer des alimens à quelqu'un peut ordonner que la somme ou la pension qu'il destine à cet objet ne pourra pas être saisi par les créanciers du donataire ni du légataire; et sa disposition est valable. Il y a plus: la loi* 3, *ff de Cess. Bon. veut que s'il a été fait un legs pour cause d'alimens à celui qui a fait cession de biens; les créanciers des légataires ne puissent pas saisir le legs, bien que le testateur n'ait pas ordonné qu'il serait insaisissable. C'est donc aux termes de la loi une faveur attachée à ce qui est donné d'être insaisissable.*' He refers to 2 *Duperier*, edit. of 1759, p. 156, who cites an *arrêt qui est conforme à ce principe.*

"So also *Guyot, Répertoire de Jurisprudence, verbo Alimens*, p. 324, and at p. 325 he says: '*On ne peut pas admettre la compensation en matière d'aliment si celui qui doit des alimens est d'ailleurs créancier de celui auquel ils sont dus, il faut qu'il les paie sauf à se pourvoir sur les autres biens de son débiteur s'il y en a; et quand il n'y en aurait point la compensation n'aurait point lieu parce qu'il faut que les alimens soient employés suivant leur destination à l'entretien de celui à qui ils ont été assignés.*'

"*Pothier, Tr. des Obligations*, No. 625, says: '*La dette d'une somme qui m'a été donnée ou léguée pour servir à mes alimens, et avec la clause qu'elle ne pourrait être saisie par mes créanciers, est une dette contre laquelle on ne peut opposer aucune compensation, car de même*

que cette clause empêche qu'elle ne puisse être saisie par des tiers, elle empêche par la même raison que cette somme ne puisse par le moyen de la compensation être employée au paiement de ce que je devais à celui qui en est le débiteur,' &c.

"*Bell,* in his Commentaries on the Law of *Scotland,* vol. i. [Ed. of 1826], p. 129, says this might be cited as a passage in a book of Scottish law, and referring to *Dirleton,* who reports the case of *Bromhall* v. *Darsie,* 7th of July, 1678, to the same effect. All these give full force to the condition of freedom when directed as here.

"Many other authorities might be cited to the same effect. It is only necessary to add that our *Civil Code,* No. 1190, enacts as follows: 'Compensation takes place, whatever be the cause or consideration of the debts, or of either of them, except in the following cases, &c.: 3rd. A debt which has for object an alimentary provision not liable to seizure;' and that *Pothier,* in his *Procédure Civile,* No. 501, says: "*Les revenus des biens qui ont été donnés ou légués à la charge de n'être susceptible d'aucune saisie arrêt n'en sont pas susceptible, car il est permis au donateur ou testateur d'assurer telle condition que bon lui semblera à sa libéralité, c'est ce qui a été jugé par un arrêt du* 29 *Novr.* 1734, *qui a donné mainlevée des saisies arrêts d'un usufruit légué par un parent collatéral à la charge de ne pouvoir être saisi.*' It is manifest that the authoritative disposition of the testator, concurring with the authoritative disposition of the law, sets aside and rejects the Appellants' plea of compensation against the Plaintiff's demand.

"The second plea of *rapporter à la succession ou moins prendre par le légataire,* return by the beneficiary legatee or the Plaintiff to the estate of the amount of his debt, is predicated upon an entire misapprehension of law. By the law, when an estate devolves upon the heirs or legatees, inasmuch as none of them can be compelled to remain in undivided ownership, a partition of the estate may be required, and for such partition each co-heir returns into the mass of the estate the gift made to him and the sum in which he is indebted, see *Code Civil,* No. 700, after which the shares are equalised amongst the co-heirs, or, if the return be not made by one or more of them, he, or they, take a less share *en nature* in proportion to what may not be returned by them. But this return

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applies to final partitions of estates, and can have no reference to the quarterly payments of the revenue of this estate directed to be paid for the support of the testator's children until the majority of his youngest grandchild, when alone the estate is to be finally divided amongst the participants entitled thereto *who might then be alive: 'C'est au moment où le partage doit se faire que l'héritier qui doit rapporter peut être obligé de prendre autant moins en nature sur la succession pour sa portion héréditaire,'* 2 *Grenier, Des Donations,* p. 231; and so also the great body of authority upon this point. The return in this case is subject to the contingency of the survivorship of the children at the time fixed for the final division, the testator by his will declaring: "And it is my wish and desire that in the event of any one or more of my children dying unmarried, or dying married but without issue, or such issue predeceasing themselves, the share of the party so dying, either in the revenue or capital, shall revert and fall into the mass of my estate and be divided between the survivor or survivors of them, or their lawful issue, as aforesaid, share and share alike;" thereby plainly indicating the fixed period of the final division. It is manifestly a legal fallacy to contend, as has been done by the Appellants, that the quarterly participation in the annual revenue, intended merely for the temporary alimentary support of the children, is the equivalent of the final partition when and by which the share of each survivor in the corpus producing that alimentary revenue was to be specially appropriated to each survivor in full property of his share. This second plea cannot stand, therefore, against the action without importing into the will a patent contradiction of the testator's declared desire and wish, as well as intention.

"The third plea of payment is entirely unsupported in law and unproved in fact, and is also untenable; whilst the fourth, the *défense au fonds en fait,* a general denegation of the Plaintiff's averments in his declaration, is quite unavailing, the averments themselves and their sufficiency having been fully established.

"It would be waste of time to examine the case in greater detail. It has been argued before us much, so to speak, in the nature of a family contention, upon the liability or charge and legal extent

and effect of the alimentary allowance made to the Plaintiff; assuming even that as between the Plaintiff and his father, the testator, or between him and the testator's estate, the relation of debtor and creditor existed, that relation in neither case could affect the Plaintiff in regard to his alimentary allowance under the will, for so far as the testator himself was concerned it produced no effect upon him, and did not induce or influence him to make any alteration in his testamentary provision in favour of his children, the Plaintiff included, for their *free and uninterrupted enjoyment of the annual net revenue of his estate, set apart by himself for their support and maintenance,* until the time limited by himself for the final division of this estate; nor, on the other side, so far as the estate was concerned, could it have effect against the will itself, the only title under which the Appellants could have or had a right to question the Plaintiff's demand, because the will was mandatory upon them and absolutely in favour of the Plaintiff, the provision in question being perfectly consistent with law and the right of the testator to make, and moreover unrestricted and unlimited in its terms of protection and freedom of enjoyment by the testator's children, intended beneficiaries, against their own acts of alienation or anticipation, as well as against the acts of their creditors. Under these circumstances, and in the face of the testator's express intention of the application of the annual revenue and its quarterly payments for aliment only, and with his decided and precise condition guarding his paternal bounty for the support of his children against action either by themselves or their creditors, it is impossible to conceive that he intended to permit that same alimentary support to be diverted by the Appellants from its purpose and object and converted into a means of paying off his own or his estate's claim by the withholding of that support and the application of the quarterly payments in the manner proposed by the Appellants. He must have known that at the time of the final partition of his estate the indebtedness of his children might then be taken into account in establishing the amount of their respective shares in the *corpus,* but until that event occurred he manifestly intended that they should freely receive the alimentary support he gave them. The Respondent's case has been established, and the appeal must be dismissed."

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Sir *R. Baggallay*, Q.C., and Mr. *F. W. Gibbs*, for the Appellants:—

The will directed the trustees to reduce the residue into possession without delay. It expressly imposed on the Plaintiff, as trustee, the duty of bringing the debt which he owed into the common fund, and his failure to do so suspended his right to receive his share of the fund.

The first proceedings of the trustees and executors and the way in which the accounts were kept, as against the Respondent *James Muir* and against the other children of the testator, shew that this was the understanding at first. All were dealt with equally, and interest upon the debts due from them was brought into account, and this was the only way of keeping the account without giving an unfair advantage. The other children who were indebted acquiesced in this, and the Respondent also acquiesced for a time. Instead of the money being taken from him and paid out to him he took it as paid.

The alimentary devise, and the privileges attaching to aliment, do not come into existence till the debts have been ascertained and collected; at all events until the revenue has been calculated upon the whole *corpus* as has hitherto been done.

In *Renaud* v. *Guillet* (1), from *Lower Canada*, a restriction upon alienation contained in a will was held invalid. A mere direction not to alienate is *brutum fulmen*. The Respondent had a right to alienate that portion of the revenue of the estate which was payable to him.

The presumable intention of the testator was only to exempt the alimentary provision for his children from transfer and assignment, and not to free it from any charge and lien which the executors might have on it for indebtedness to the estate.

There ought to be compensation; that is to say, what is due from each should be brought into hotchpot before anything is taken out.

It is out of the net revenue that payments are to be made. That is to say, the actual income, including interest on debts due from the co-heir.

The Respondent's demand is clearly in excess of what he is

(1) Law Rep. 2 P. C. 4.

entitled to, inasmuch as it embraces a share of interest made up in part of sums payable by himself which he has not paid. The decree orders the trustees to pay money which they have not got.

A debt due from an executor is assets in his hands. He cannot sue for it; he must bring it into account; he must sue his co-executors and make them pay his debt out of the assets in their hands.

The Plaintiff being a trustee and executor, his claim has lost the immunity from compensation which, by the general law, an alimentary provision would possess by reason of the rule that a trustee or executor cannot take anything out of the estate while he continues to be indebted to it. A trustee cannot get an advantage over his co-heirs by neglecting to get in the estate.

The Court said the principal was to be returned only on a final partition. We do not contend that quarterly payment of interest is equivalent to final partition, but a claim for such payment is of the nature of an action for partage, and rules analogous to the rules of final partition ought to prevail.

The succession opens on the death of the ancestor. The obligation to return on partition whatever a sharer has received in advance attaches at once.

The interests of the children are liable to be divested unless they live till the youngest grandchild attains twenty-one.

The capital may possibly all go to the Respondent; possibly none of it may go to him, in which case the estate can never be recouped through him. He was suing to recover out of the general assets, and he himself has assets. It was an irregular form of action, but the decree was not right in making the payment out of the assets of the estate.

The decree has not taken into account that *James Muir* was executor and trustee as well as a co-heir; nor has it applied the principles which must regulate the final partition of capital to intermediate devisees.

Sect. 723 of the Code says returns are due only from co-heir to co-heir, not to legatees. But this is a case of co-heirship. Sect. 597 of the Code explains that a man is constituted heir either by testamentary or intestate succession.

At the close of the argument for the Appellants their Lordships,

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intimating a general concurrence in the judgment appealed from, called upon the counsel for the Respondent to explain how the amount decreed was made up.

Mr. *Matthews* admitted that the amount was made up in part of money credited or interest due from the Respondent.

Their Lordships' judgment was now delivered by

SIR JAMES W. COLVILE :—

The questions to be determined on this appeal arose on the will of *Ebenezer Muir*, late of *Montreal*, who died on the 12th of January, 1866. The instrument, which bears date the 23rd of May, 1857, is made in notarial form; and the construction of its provisions, and the effect to be given to them, must, as both sides admit, be governed by the law of *Lower Canada*.

The material clauses are, in effect, as follows :—[His Lordship here read the material clauses of the will, and stated the transactions between the Appellants and the Respondent up to the institution of the suit.]

The Respondent, on the 14th of April, 1869, commenced his suit against the Appellants for the recovery of the three quarterly instalments which had accrued due to him on the 1st of September, 1868, the 1st of December, 1868, and the 1st of March, 1869.

It is possible that to the form of this action, which is peculiar, exceptions might have been taken. None, however, was taken in the Courts below; and it has fairly been conceded at the Bar, that their Lordships need not concern themselves with objections of form, but may determine the case on its merits.

The defence actually made by the Appellants consisted of four pleas, each going to the whole action, viz.: a plea of compensation; one of return or rapport; one of payment, and the *Défense au fond en fait.*

The cause was first decided by the Superior Court, which gave judgment in the Plaintiff's favour, on the 30th of November, 1869 The judgment ruled that the Plaintiff was not bound to suffer the compensation claimed by the Defendants, and was not bound to make at present, and so as to vacate or diminish his claim in this

cause, the rapport claimed by the Defendants by reason of the Plaintiff's indebtedness to the estate of his late father; and, further, that the Defendants had failed to prove their plea of payment; and it condemned the Defendants jointly and severally to pay the sums claimed with interest.

This judgment was, on the 9th of September, 1870, upheld on appeal, by the unanimous judgment of the five Judges of the Court of Queen's Bench, against which this appeal has been preferred.

Their Lordships entirely concur with the two Canadian Courts in thinking that there was no evidence to support the plea for payment. If the appeal is to succeed, it must do so on the defence raised by either the first or the second plea. The question on the first plea is, whether the claim of the Plaintiff can, by the law of *Canada*, be the subject of compensation. The Plaintiff's share in the revenue of the testator's residuary estate is beyond all doubt an alimentary allowance; and the authorities cited by Mr. Justice *Badgley*, and the 1190th Article of the *Civil Code*, established that a debt arising in respect of an alimentary allowance is generally incapable of being the subject of compensation. That such a plea would be bad if the question had arisen between the trustees and one of the children indebted to the estate who was not a trustee, is, their Lordships apprehend, too clear for argument. It is, however, contended that the fiduciary character of the Plaintiff, and the duties imposed upon him by the will, take this case out of the particular rule. Sir *Richard Baggallay* relied, first, on the direction in the will that the trustees should reduce the residue into possession without delay. He did not go so far as to say that this clause made the realization of the whole residue a condition precedent to the distribution of the annual income of the residue. But he insisted that it expressly imposed upon the Plaintiff, as trustee, the duty of bringing the debt which he owed into the common fund, and that his failure to do this suspended his right to receive his share of the fund.

Another argument was founded on the English doctrine, that a debt due from an executor is assets in his hands. This doctrine, however, if it obtains in *Lower Canada*, where the functions and powers of an executor are by no means the same as those of an English executor, seems to their Lordships to have little applica-

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tion to the present case, in which, *ex concessis*, the debt continues to be outstanding, the larger portion of it being the subject of a special contract between the debtor and his co-trustees. In truth the argument for the Appellants on this part of the case seems to resolve itself into this: that the Plaintiff being a trustee and executor, his claim has lost the immunity from compensation which by the general law it would possess, by reason of the rule (assumed to exist in *Lower Canada* as in *England*) that a trustee or executor cannot take anything out of the estate whilst he continues to be indebted to it. But for this exception to the general rule of the law of *Lower Canada*, no authority has been adduced. This law does not recognize the distinction between law and equity which obtains here. It has now been reduced to a code. The Articles of the Code expressly state: first, that when two persons are mutually debtor and creditor of each other, both debts are as a general rule extinguished by compensation; and, secondly, that compensation does not take place in the case of a debt which has for object an alimentary provision not liable to seizure. The Defendants by their plea invoke the first Article, which is wide enough to embrace every case of set-off, whether legal or equitable. And their Lordships cannot see that, by any other Article of this Code, or otherwise, the Courts in *Canada* have power upon some supposed ground of equity to engraft an exception upon the exception established by the second Article.

It is suggested in the Appellant's *factum* filed in the Court of Queen's Bench, that the Respondent, being a trustee, might, if his argument be well founded, continue to receive his alimentary allowance, although he had misappropriated to a large extent the trust fund. It is not necessary to consider what would happen in such a case. It is sufficient to say that the debt by which it is now sought to compensate the alimentary provision does not arise out of misappropriation of trust moneys; but out of transactions with the testator in his lifetime.

Again, it is stated in the first plea that the presumable intention of the testator was only to exempt the alimentary provision made to his children from transfer and assignment to strangers, and not to free it from any charge or lien which the executors might have on it for indebtedness to the estate. And argu-

ments founded on this presumed intention have been used both in the Court of Queen's Bench and here at the bar. Their Lordships, however, concur with the learned Judges of the Court of Queen's Bench in thinking that no grounds for imputing to the testator an intention to vary the general law as to alimentary provisions are to be found in his will. The scheme of his will is this: By the exercise of the testamentary power he suspended the vesting of the shares of his heirs in the corpus of his estate, or made them capable of being divested; and so far deprived his children of that which the law would have given them if he had died intestate. As a compensation for this he gave them, until the period of final division should arrive, this alimentary provision, with the benefit of that protection which the law of *Canada* throws over such provisions. There are no words from which it can be inferred that he intended to diminish that protection. The fact that the Respondent and others of his sons were indebted to him, or generally embarrassed when he made his will, or afterwards became so, tends in their Lordships' opinion rather to raise than to rebut the presumption that he meant this alimentary provision to be free from all claim to compensation; and to insure to them the means of support whilst they were kept out of their inheritance.

Their Lordships have next to consider the defence made by the second plea, which is founded on the right to "rapport" or "return." The slightest reference either to the Canadian Code, chap. v. sect. 1, or to the corresponding chapter in the *Code Napoléon*, livre III., chap. vi. sect. 1, is sufficient to shew that this right is simply an incident to a partition; that it is one which may be claimed by the co-heirs (in France, natural; in *Canada*, either natural or testamentary) against an heir who is either indebted to the estate, or has received certain advantages out of the succession from the ancestor in his lifetime by gift *inter vivos* or otherwise. So far as it applies to a debt due to the estate, it is only compensation in particular circumstances, and in a particular form. And, accordingly, it is not easy to see wherein the second plea substantially differs from the first.

In the argument at the Bar it was almost conceded that this plea could not be supported, in so far as it insists on the application of the principle of "*rapport*" until the whole debt, principal

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and interest, was satisfied. But it was argued that the claim of the Respondent was in the nature of an action for "*partage*" of the income; and, consequently, that he was bound to bring in, by way of "*rapport*," at least the interest of the debt.

This argument seems to their Lordships to proceed on a false view of the relations between the parties. The question does not arise upon a partition, properly so called, even of income, between the testator's co-heirs, but upon the execution, by his trustees, of a particular trust in his will; and, therefore, neither as to principal nor as to interest does there seem to their Lordships to be any solid foundation for the trustee's present claim to a "return;" a claim which is only an indirect mode of obtaining that compensation which the law will not allow them to have directly or *eo nomine*.

Their Lordships are, therefore, of opinion that the judgment of the Court of Queen's Bench was right as to all the defences raised in the action.

There remains, however, to be considered a question of minor importance, which though raised in the Appellant's *factum* does not appear to have been noticed by the learned Judges of the Court of Queen's Bench. It is, that the judgment of the Superior Court is, at all events, excessive, in that it has given to the Respondent the instalments of his alimentary provision, as calculated upon the assumption that the interest due upon his debt entered into the general income of the residue. The result would be that, though he has not paid that interest, he will receive one-tenth of it in the instalments claimed, and be overpaid by about 27 dollars. This point has now been discussed at the Bar, and it has been agreed that the sum for which judgment has been entered ought to be reduced by this amount and any interest that has been calculated upon it.

Their Lordships need hardly point out that the judgment under appeal will in no way prevent the Respondent's co-trustees from enforcing, in another suit, the claims of the estate against any other property which he may possess, if any such there be, or his co-sharers in the estate from insisting on the right of "rapport," on the final partition of the corpus. But, for the reasons above given, their Lordships must humbly recommend Her Majesty to affirm the judgment of the Court of Queen's Bench, subject to the

reduction above stated. Their Lordships do not think that this slight variation in that judgment ought to occasion any departure from the general rule as to costs. And the Respondent will accordingly have the costs of this appeal.

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Solicitors for the Appellants: *Wilde, Wilde, Berger, & Moore.*
Solicitors for the Respondent: *Rooks, Kerrick, & Co.*

In re JOHNSON'S AND ATKINSON'S PATENTS.

J. C.* 1873 *July* 19 *Nov.* 4.

Letters Patent—Accounts not filed in Time—Prolongation of Term.

The Judicial Committee will refuse to enter upon accounts in a Patent case if they have not been filed as required by the 9th Rule.

Two cognate patents, having different terms to run, extended so that both should expire on the same day.

THIS was an application for the prolongation of two cognate patents of different dates.

By the 9th of the rules touching letters patent, to be observed in proceedings before the Privy Council, under the Act of the 5 & 6 Will. 4, intituled "An Act to amend the Law touching Letters Patent for Inventions," it is provided that a party applying for an extension of a patent under sect. 4 of the said Act must lodge at the Council Office four copies of the balance-sheet of expenditure and receipts relating to the patent in question, which accounts are to be proved on oath before the Lords of the Committee at the hearing.

All copies mentioned in this rule must be lodged not less than one week before the day fixed for hearing the application.

The Judicial Committee will hear the Attorney-General, or other counsel on behalf of the Crown, against granting any application made either under the 2nd or 4th section of the said Act, in case it shall be thought fit to oppose the same on such behalf.

Mr. *Webster*, Q.C., and Mr. *R. E. Webster*, appeared for the Petitioner.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

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In re JOHNSON'S AND ATKINSON'S PATENTS.

Mr. *C. Bowen*, for the Attorney-General, took the preliminary objection that the accounts required by the 9th rule had only been filed on the morning of the day of hearing.

SIR ROBERT P. COLLIER (after referring to the Rules) :—

The reason for the 9th rule is obvious. It is necessary that the Attorney-General should have the power of inspecting any such accounts, and of making any inquiries in respect to them. Their Lordships consider themselves bound by that rule to reject the account which has been put in for the first time this morning. They consider that they are not able to entertain it, and the other account is manifestly insufficient. They feel themselves in this alternative position, either to decide against the application, or to adjourn the case. They assume that the Petitioner would prefer an adjournment.

At the same time their Lordships understand that the Petitioner is in a delicate state of health, and desires to go abroad. They have no objection to his giving evidence upon the merits of the invention. But they cannot entertain the question of the accounts. They feel that the Attorney-General is in a position to object to the accounts being gone into at the present time (1).

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Nov. 4.

This application now came on to be heard, and their Lordships, after hearing Mr. *Webster* and Mr. *R. E. Webster* for the Petitioner, and Mr. *C. Bowen* for the Attorney-General, were of opinion that the Petitioner had proved the merit of the invention, and the insufficiency of the remuneration; and they announced that they would recommend Her Majesty that the older patent, which would expire on the 13th of December, 1873, should be extended for the further term of five years, ending on the 13th of December, 1878; and that the other, which would expire on the 12th of September, 1876, should also be extended to the 13th of December, 1878, so that both should expire on the same day.

Solicitors for the Petitioner: *Roy & Cartwright.*

(1) Their Lordships followed the same course in *Re Chatwood's Patent*, Feb. 3rd, 1874.

ONG CHENG NEO . . . . . PLAINTIFF;

AND

YEAP CHEAH NEO, KHOO KAY CHAW, KHOO FIEW JEONG NEO, AND HER HUSBAND LIM CHENG KEAT, EXECUTORS OF THE LAST WILL AND TESTAMENT OF OH YEO NEO, DECEASED, LIM CHOON YEK, NIECE OF THE SAID OH YEO NEO, AND HER HUSBAND CHEAH ON HEAP LIM AH YONG, AND WEE SAH NEO, LEGATEES NAMED IN THE SAID WILL OF THE SAID OH YEO NEO, DECEASED . . . . . } DEFENDANTS.

J. C.
1874
Jan. 31.

FROM THE SUPREME COURT OF THE COLONY OF THE STRAITS SETTLEMENT IN ITS DIVISION OF PENANG.

Special Leave to appeal—Straits Settlement.

The Supreme Court of the *Straits Settlement* having refused to grant leave to appeal to the Queen in Council, on the ground that it did not possess power to grant such leave, the Judicial Committee granted leave to appeal against the original decree, and also against the order refusing leave to appeal.

THIS was a Petition for leave to appeal from a decree of the Supreme Court of the above-named colony, and also for leave to appeal from an Order of the said Court refusing leave to appeal.

The Petition stated that the Royal Letters Patent of the 10th of August, 1855, reconstituting the Court of Judicature at *Prince of Wales Island* (or *Penang*), *Singapore*, and *Malacca*, contained provisions regulating appeals to Her Majesty in Council, by which the time for appeal was fixed not to exceed twelve months, and the appealable amount was fixed at $1591, or £350 sterling; that on the 1st of April, 1867, the *Straits Settlement*, of which *Penang* forms a part, became an independent colony, with a Legislature of its own.

* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR JOHN BARNARD BYLES, and SIR LAWRENCE PEEL.

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That the Local Ordinance, No. 5, of 1868, was accordingly passed, intituled "An Ordinance for constituting a Supreme Court of Judicature," and by it the above-mentioned Court was abolished, and the present one, "the Supreme Court of the *Straits Settlement*," established in its place.

That Ordinance contains the following provisions:—

"The Court of Judicature of *Prince of Wales Island, Singapore,* and *Malacca,* established under Royal Letters Patent, is hereby abolished, and the said Royal Letters Patent shall cease to have any operation in the colony from and after the coming into operation of this Ordinance: Provided that nothing herein contained shall be held to abolish the several Courts for the recovery of small debts in the colony, established by the Governor and Council under the provisions of the said Letters Patent.

"All provisions of Acts of the Imperial Parliament, Orders of Her Majesty in Council, Orders of Government, Letters Patent, Acts of the Legislative Council, and of the Legislative Council of *India,* in force in the colony when this Ordinance comes into operation, and which are applicable to the said Court of Judicature or to the Judges thereof, shall be taken to be applicable to the said Supreme Court and to the Judges thereof, and all general Rules and Orders of the said Court of Judicature, and all tables and scales of fees in force when this Ordinance shall come into operation shall continue in force, so far as may be consistent, in all the above cases, with the provisions of this Ordinance, and with the provisions of any previous Act or Ordinance of the Legislative Council."

That clause 30, directing a civil suit to be commenced by writ of summons, provides that "In all other respects the method of commencing and prosecuting suits and proceedings at present in operation in the said Court of Judicature (meaning the said abolished Court) in its several jurisdictions, when not inconsistent with the provisions of this Act, shall continue to be in force in the said Supreme Court."

A decree having been pronounced, which was drawn up and passed in the month of March, 1873, in a suit for the administration of the estate of a person deceased, which estate was of the value of many thousand pounds, the Petitioners, without loss of

time, applied to the Court by petition for leave to appeal to Her Majesty in Council against the decree. On the 4th of July, 1873, the Court dismissed the petition on the ground, which was stated in the order of dismissal, that the Royal Letters Patent of 1855 had ceased to have any operation in the colony, and that consequently the Court had no authority to grant leave to appeal.

The Petitioners, contending that the Court did possess power to grant leave to appeal, and that, even if it did not, the case was a fit one for appeal, applied to the Privy Council for leave to appeal to Her Majesty in Council against the original decree, and also against the order by which leave to appeal was refused, and that the taking of accounts, and all other proceedings in execution of the decrees, might be suspended during the pendency of the appeal.

Mr. *Willis*, for the Petitioner, cited *Siemens* v. *Heirs of Bufe* (1).

Mr. *Fitzjames Stephen*, Q.C., and Mr. *C. Bowen*, appeared for the Respondents.

THE COURT made the order on the usual terms as to giving security.

Solicitor for the Petitioner: *T. G. Everitt.*
Solicitors for the Respondents: *Walker & Martineau.*

(1) 11 Moo. P. C. 62.

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JAMES BLACKWOOD AND CHARLES IBBOTSON . . . . . } APPELLANTS;

AND

THE LONDON CHARTERED BANK OF AUSTRALIA . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NEW SOUTH WALES, IN ITS EQUITABLE JURISDICTION.

Registration pendente Lite—Effect of Regulations made under a Statute—Crown Leases.

The *Crown Lands Occupation Act* of 1861 of the colony of *New South Wales* confers (sect. 36) on the Governor in Council power to make regulations for carrying the Act into full effect, such regulations to be published in the *Gazette* and laid before the Colonial Parliament. Such regulations may govern, not only the form but the effect of instruments of transfer of those rights which precede the grant of Crown leases.

Such regulations, to be valid, must relate to matters arising under the provisions of the Act, and not provided for in the Act, and must be consistent with the provisions of the Act.

The right to call for a lease from the Crown may be effectually transferred under the regulations.

A person who has *bonâ fide* paid money without notice of any other title, may afterwards, even *pendente lite*, get a legal title if he can, and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself.

The Crown lands of the colony are held by Her Majesty for distribution according to the *Constitution Act*, and as now directed to be disposed of under the *Crown Lands Act* of 1861.

THE question on this appeal was one of priority of charge. It was raised by a bill in equity filed by the Appellants to obtain a declaration in their favour and to restrain an action of ejectment commenced by the Respondents. The bill was dismissed at the hearing by the Primary Judge of the Supreme Court of *New South Wales*, and his decision was affirmed by the Court of Appeal. From this dismissal the present appeal was brought.

* *Present:*—THE LORD CHANCELLOR (LORD SELBORNE), SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

In July, 1863, Mr. *Hugh Glass* held a Crown licence of a certain station or run situate in the *Murrumbidgee* district, and called *Noweronie* or *Nouranie*. According to the provisions of the *Crown Lands Occupation Act*, 1861, Mr. *Glass* was, by virtue of such licence, entitled to a lease for five years of the said station or run, on payment of rent, to be determined by appraisement of the fair annual value thereof, for pastoral purposes; and, according to the Regulations made under the same Act, this right was transferable by an application to the Chief Commissioner of Crown Lands. The more important of these Regulations are the 28th and 31st, which are as follows:—

28. "Holders of runs of which the leases have not issued may have their rights of lease transferred by an application addressed to the Chief Commissioner of Crown Lands, and bearing the signature of the person entitled to the lease, attested by a magistrate, a notary public, or a commissioner of the Supreme Court. On such application being recorded, the applicant will be debarred from all further claim to the lease, the right to which will thenceforth become vested in the transferee."

31. "Every transfer of a run will carry with it all rights of the transferor in connection therewith, except with respect to any land actually purchased and paid for, the ownership of which will, of course, remain in the purchaser, notwithstanding any subsequent transfer of the run."

The Registration of deeds and other instruments in *New South Wales* is governed by an Act of 7 Vict. No. 16. The principal sections of this Act are, the 10th, which provides that all wills, agreements in writing, deeds, conveyances, and other instruments (except leases for less than three years) affecting real property shall or may be registered in the office of the Registrar-General; the 13th, which provides how registration shall thenceforth be effected; and the 11th and 22nd, which are as follows:—

11. "And be it enacted that all deeds and other instruments (wills excepted) affecting any lands or hereditaments, or any other property, in the said part of the colony of *New South Wales*, which

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shall be executed or made *bonâ fide* or for valuable consideration, and which shall be duly registered under the provisions of this Act, shall have and take priority, not according to their respective dates, but according to the priority of the registration thereof only."

22. "And be it enacted that the term 'instrument' hereinbefore used shall, for the several purposes of this Act, be construed to include, not only conveyances and other deeds, but also all instruments in writing whatsoever whereby real or leasehold estates or stock shall be affected or shall be intended so to be."

Mr. *Glass* was indebted to the Appellants (who were merchants carrying on business in *Geelong*, in the colony of *Victoria*, under the firm of *Dalgety & Co.*) in various sums of money in respect of bills of exchange accepted or indorsed by the Appellants on his account and otherwise, and in order to secure to them the repayment of these sums Mr. *Glass* agreed to transfer to the Appellants his interest in the said run.

Mr. *Glass* accordingly, in July, 1863, signed and gave to the Appellants a letter of transfer, of which the following is a copy:—

"Sir,—I hereby notify to you that I have assigned and transferred to *James Blackwood* and *Charles Ibbotson*, of *Melbourne*, all my right, title, and interest in and to the run of Crown lands situate in the district of , and known as *Nouranie*, now held by me under promise of lease from the Crown; and I hereby relinquish, in favour of the said *James Blackwood* and *Charles Ibbotson*, all and any the rights and privileges of occupation or of pre-emption which may belong or accrue to me as the holder of a promise of lease of the said run under the laws and regulations for the time being. As witness my hand, at *Melbourne*, this 27th day of July, in the year of our Lord 1863.—Signed by the said *Hugh Glass*, in the presence of *Albert A. C. Le Soney*, J.P., a Commissioner of the Supreme Court.

"*Hugh Glass.*"

"To the Chief Commissioner of Crown Lands,
Sydney."

In the following year Mr. *Glass* wrote and sent to the Appellants another letter, of which the following is a copy:—

"*Melbourne*, 6th April, 1864.

"Messrs. *Dalgety & Compy.*,

"Dear Sirs,—I hereby hand you transfer of *Nouranie Run*, in the colony of *New South Wales*, to be held by you as security for any bills of exchange you may have already, or may hereafter accept or indorse on my account; and you are authorized to register the said transfer when you think proper.

"Yours truly,

"*Hugh Glass.*"

Mr. *Glass* requested the Appellants not to register or record the said transfer in *Sydney*, and it accordingly remained in their possession until forwarded to *Sydney* in May, 1869, as mentioned below, for the purpose of being registered.

The *Nowranie Run* had, in the month of September, 1865, been appraised pursuant to the *Crown Lands Occupation Act*, 1861, at a rent of £197 3*s*. Notice of this appraisement was given to Mr. *Glass*, and also inserted in the Government *Gazette*, in which it was stated that a new lease of the said run for five years would be granted to Mr. *Glass* on payment of the appraised amount on or before the 30th of December, 1865. The appraised amount was paid, but no lease was issued at that time.

In April, 1868, Mr. *Glass* applied to the Respondents, who carried on business as bankers in the colonies of *Victoria* and *New South Wales*, for an advance of £40,000 on his promissory note, secured by the transfer of a mortgage to himself of certain property known as the *Clare Blocks*. The Respondents required additional security, and Mr. *Glass* then offered to transfer to them the licence held by him of the station or run above-mentioned in the *Murrumbidgee* district.

The Respondents agreed to advance, and on the 8th of April, 1868, advanced to Mr. *Glass* the sum of £40,000 on this security. He thereupon gave the Respondents his promissory note, becoming due on the 11th of August, 1868, and lodged with them a letter of transfer of the said station or run, together with the mortgage of the *Clare Blocks*, and a transfer thereof to the Respondents, and

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bills of exchange for £63,000, to secure which such mortgage had originally been given.

The following is a copy of the letter of transfer:—

"Sir,—I hereby notify to you that I have assigned and transferred to the *London Chartered Bank of Australia* all my rights title, and interest in and to the run of Crown lands situate in the district of *Murrumbidgee*, and known as *Nouranie* or *Noweronie*, now held by me under promise of lease from the Crown; and I hereby relinquish, in favour of the said *London Chartered Bank of Australia* all and any the rights or privileges of occupation or of pre-emption which may belong or accrue to me as the holder of a promise of lease of the said run under the laws and regulations for the time being. As witness my hand, at *Melbourne*, this 8th day of April, in the year of our Lord 1868.

"*Hugh Glass.*

"Signed by the said *Hugh Glass*, in the presence of *Frederick Cook*, J.P., colony of *New South Wales.*

"To the Chief Commissioner of Crown Lands,
Sydney."

Mr. *Glass* stated to the Respondents that the licence of the *Noweronie* station or run was absolutely standing in his own name, free from any lien, charge, and incumbrance whatsoever; and when the advance of £40,000 was made, and the transfer of the said licence was lodged with the Respondents, they had no notice or knowledge whatsoever that the Plaintiffs, or either of them, held any prior transfer thereof, or had any lien, charge, or incumbrance thereon.

On the 15th of April, 1868, *Philip Kelly*, a clerk of Messrs. *Roxburgh, Slade, & Spain*, the Respondents' solicitors, by their direction, and on behalf of the Respondents, made the usual searches against the said station or run in the office of the Chief Commissioner of Crown Lands, *Sydney*, and also in the office of the Registrar-General, *Sydney*, and found that Mr. *Glass* was registered as the holder of the licence of the said run from the Crown, and that no transfer thereof, incumbrance thereon, or dealing therewith, had been recorded or noted.

The Respondents did not, in April, 1868, propose to have the

transfer to them of the said station or run completed by registration, but they forwarded the same to the Chief Commissioner of Crown Lands, *Sydney*, with a request that it might be allowed to be deposited in accordance with what was supposed to be the custom in the office. It was mentioned in the letter making this request that the object was to prevent, as far as possible, Mr. *Glass* from completing a transfer to any other person pending the security to the bank.

The letter of transfer was returned from the office with an intimation that it was not stamped, and that if stamped it could only be lodged in the office with a view to being completed. There appears, however, to have been, about that time, made in the run-book kept in such office, opposite to the name of *Nowranie Station*, a pencil note, of which the following is a copy:—

"Not to be transferred to any one else but the *L.C.B.* of *Australia*, 68,916."

Mr. *Glass's* promissory note was not paid at maturity, but by way of renewal thereof, and, for the purpose of extending the time for payment of the sum of £40,000, he made and delivered to the Respondents another promissory note for that amount, dated the 1st of August, 1868, and payable five months after date; and in consideration of the Respondents accepting such renewal he agreed, for their further and better security, to sign, and he accordingly signed, a memorandum or letter of deposit with respect to the security held by them.

The following is a copy of such memorandum or letter:—

"No. 149. Book 120. Equitable Deposit.

"To the Manager of the *London Chartered Bank of Australia*, *Melbourne*.

"*Melbourne*, 2nd September, 1868.

"Sir,—In consideration of your having discounted, at my request, my promissory note in favour of the bank for £40,000—say forty thousand pounds sterling—dated 1st August, 1868, and payable five months thereafter, I hereby, in security of its due payment or of any renewals thereof, deposit in your hands transfer of licence of *Nouranie Run*, in the *Murrumbidgee* district of the colony of *New South Wales*, together with an assignment of a mortgage, executed

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in my favour by *William Nash*, over *Clare Blocks*, known as *Clare A*, *Clare B*, *Clare C*, *North Clare A*, and *Clare B* stations, in the *Darling* district, in the colony of *New South Wales*, dated 8th day of April, 1868, also licences of said stations; and I hereby undertake, when called upon so to do, to make an assignment to you of the above mortgage, with all my interest and powers conferred therein.

"I am, Sir,

"Your very obedient servant,

"*Hugh Glass.*

"*Edwin Brett*,

"Manager, *London Chartered Bank of Australia, Melbourne.*"

The renewed note for £40,000 was accepted by the Respondents, the last-stated letter was signed and given to them without any notice of any prior interest, lien, or incumbrance created by Mr. *Glass* in favour of the Appellants, or either of them; and the first notice to the Respondents of any such interest, lien, or incumbrance was given in May, 1869, by the Appellant *James Blackwood* to *Edwin Brett*, of *Melbourne*, the Respondents' inspector for the colonies of *Victoria* and *New South Wales*.

The said Appellant then remarked to Mr. *Brett* that he understood that Mr. *Glass* had given the Respondents a transfer of the said station, and that they (the Appellants) held an old one, which they had lying in their safe.

On the 29th of May, 1869, the Respondents caused the said letter of transfer of the *Noweronie Run*, given to them by Mr. *Glass* in April, 1868, to be duly stamped, and on the same day lodged in the office of the Chief Commissioner of Crown Lands, with a request that it might be recorded forthwith. The said letter of transfer was recorded accordingly. On the 25th of June, 1869, there was written and sent to the Respondents, from the Crown Lands Office, a letter of which the following is a copy:—

"Crown Lands Office, *Sydney*,

"25th June, 1869.

"69.27 Tr. Mn.

"Sir,—I have to notify to you that the under-mentioned transfer of run has been applied for and sanctioned in accordance with the regulations, and is now duly recorded in this department, viz.:

Name of run, *Noweronie;* district, *Murrumbidgee;* from Mr. *Hugh Glass* to the *London Chartered Bank of Australia.*

"I have the honour to be, Sir,

"Your obedient servant,

"*A. O. Moriarty,*

"Chief Commissioner of Crown Lands.

"To the Manager of the *London Chartered Bank of Australia.*

"Care of Messrs. *Roxburgh, Slade, & Spain, Sydney.*"

On the 15th of June, 1869, the Respondents also caused the said memorandum or letter of deposit of the 2nd of September, 1868, to be registered in the office of the Registrar-General, *Sydney.* This registration was intended and purported to be made pursuant to the said Act, 7 Vict. No. 16.

In the meantime the letter of transfer to the Appellants dated the 2nd of June, 1863, was forwarded to *Sydney,* and was, on the 27th day of July, 1869, deposited in the office of the Chief Commissioner of Crown Lands at *Sydney* for registration and completion. The Appellants were then informed that a transfer of the run to the Respondents had been previously lodged, but had not then been carried into effect.

The Appellants, on the 5th of June, 1869, by their solicitors, addressed to the Chief Commissioner of Crown Lands a letter of that date protesting against the transfer of the run to the Respondents, or to any person or corporation other than the Appellants, and cautioning the Chief Commissioner against carrying out the request lodged by or on behalf of the Respondents; but the Respondents' transfer was eventually recorded as above-mentioned, and that of the Appellants was not recorded in the said office.

On the 15th of July, 1869, the Appellants took possession of the said run under a mortgage thereof, and of the stock thereon depasturing, dated the 22nd of May, 1869, and a letter from Mr. *Glass* authorizing such possession, dated the 12th of July, 1869. They claimed, however, to be entitled to a charge on the run independently of the mortgage, under the circumstances already stated.

On the 5th of February, 1870, at the Respondents' request, a

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Crown lease of the run was issued to them as the transferees of the run under the letter of transfer given to them by Mr. *Glass*.

On the 22nd of February, 1870, the Respondents commenced an action of ejectment against the Appellants in the Supreme Court of *New South Wales*, in its common-law jurisdiction, to obtain possession of the run, and in this action they recovered judgment.

On the 20th of April, 1870, the Appellants filed their bill in equity to restrain the Respondents from proceeding with their action of ejectment and dealing with the lease of the run, and they thereby asked a declaration that the Respondents were trustees of the lease for the Appellants, and that they might be directed to deal therewith accordingly.

The Appellants' bill was filed on the 20th of April, 1870, and the Respondents' answer thereto was filed on the 12th of July, 1870, having been completed and sealed on the 21st of June, 1870. By way of defence to the suit they relied on the Registration of the letter of transfer of the 8th of April, 1868, and of the memorandum of deposit of the 2nd of September, 1868, and on the laches and negligence of the Appellants and their own superior diligence. They also charged the Appellants with having been privy to and having acquiesced in Mr. *Glass's* representation that the run was unincumbered, and in his having obtained a loan of £40,000 on the faith of such representation.

On the hearing of a motion for an injunction it was held by the Supreme Court on the 12th of July, 1870, that the registration of the Respondents' memorandum or letter of deposit of the 2nd of September, 1868, had not been made in strict compliance with the requirements of the said Act of 7 Vict. No. 16. On the 15th of July, 1870, at ten o'clock in the forenoon, the Respondents again registered, and more formally, the said letter of transfer dated the 2nd of September, 1868. It was not argued in the Supreme Court that this second registration did not sufficiently comply with the requirements of the said Act.

On the same day, but at a later hour, the Appellants registered the instrument of the 6th of April, 1864, above mentioned to have been given to them by Mr. *Glass*.

On the 9th of September, 1870, the Respondents applied for and

obtained leave to file a supplemental answer for the purpose of stating to the Court the registration made subsequently to the institution of the suit, and on the 19th of September, 1870, they filed such a supplemental answer, relying on the registration of the 15th of July, 1870, as a reason, in addition to those pleaded in the former answer, why the Appellants' bill should be dismissed.

The Supreme Court having granted an interlocutory injunction to restrain the Respondents from executing the judgment which they had obtained in the action of ejectment, the suit was brought to a hearing by means of notice of motion for a decree. Affidavits were filed on both sides.

The suit came on to be heard before Mr. Justice *John Fletcher Hargrave*, the Primary Judge in Equity, who, on the 14th of March, 1871, pronounced his judgment dismissing the Appellants' bill with costs. The Appellants appealed from this decision, and their appeal was heard before the Chief Justice, Sir *Alfred Stephen*, Mr. Justice *Hargrave*, and Mr. Justice *Fawcett*, who, on the 7th day of July, 1871, affirmed the decision of the Primary Judge so far as it dismissed the Appellants' bill, but ordered that the Appellants and Respondents should respectively pay and bear their own costs of suit up to and inclusive of the filing of the Respondents' supplemental answer, and also the costs of the appeal, and that the Appellants should pay the Respondents' costs from the filing of the supplemental answer down to and inclusive of the decree of the 14th of March, 1871.

The main ground on which the Court decided in favour of the Respondents was, that the fact of their memorandum or letter of deposit having been registered before any registration of any instrument of charge in favour of the Appellants was, by the *Registration Act* (7 Vict. No. 16), made conclusive, and that the priority in date of the Appellants' charge was immaterial. Mr. Justice *Hargrave* also relied on the charge of privity and acquiescence contained in the Respondents' answer, and the absence of any evidence on the part of the Appellants in contradiction thereto.

The following is an extract from the judgment of the Chief Justice, Sir *Alfred Stephen*:—

"Every Crown pastoral tenant purchasing his right to a stated term of lease can, in my opinion, transfer or effectually mortgage

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his interest in that term at discretion. While it subsists in his hands, the simple promise of or contract for such lease is, by the express provisions of sect. 28 [of the Regulations] equivalent (except as against the Crown) to an actual lease. In any action or suit brought 'in relation to any Crown lands of which no lease from the Crown shall be in force' any party thereto may put in evidence any such promise or contract, which shall, as between the parties, 'have the same effect as if a lease from the Crown of such lands had been duly issued in pursuance of such promise or contract to the party entitled thereunder to such lease.' An absolute legal right and status, therefore, against all parties claiming to be interested in such lands are vested in every tenant holding by contract or promise only, and the words used are large enough to include, and I think that they were meant equally to include, parties deriving title under him. I maintain that the Crown cannot, by any regulation or decision, defeat, restrict, or affect that right and status, and therefore cannot, uncontrolled by law, issue its lease to a claimant who has no title, legal or equitable, thereto after notice of the rightful claim. But if such a claimant having equal notice could retain indefeasibly the lease so issued, it would be very little to the purpose to say that the Crown, inadvertently or otherwise, had done wrong. Therefore, thinking the Crown in effect a trustee for the true owner, for reasons which need not here be repeated, I held, and still hold, that the Defendants in this case took their lease clothed with the same trust."

The judgment of Mr. Justice *Hargrave* contains the following passages:—

"This is an appeal from my decree of the 16th of March, 1870, dismissing the Plaintiffs' bill with costs.

"The chief ground for my thus dismissing the Plaintiffs' bill was that, as to the broad and substantial contests between these parties, the Plaintiffs were entirely without any equity as against the Defendants, while the Defendants had a clear and indisputable equity against the Plaintiffs by having advanced their £40,000 to *Glass* in 1868 without any notice or knowledge, express or implied, of the Plaintiffs' prior lien originating in 1863, and were prevented by the Plaintiffs from obtaining any such knowledge, by the wilful

neglect and omission of the latter to record their letter of transfer at the Lands Office till *after* the Defendants had advanced their £40,000, and *after* the Defendants' letter of transfer had been duly recorded there.

"My second ground for dismissing the Plaintiffs' bill was that the new evidence at the hearing disclosed two additional objections to the Plaintiffs' bill, each in itself quite conclusive for the Defendants' protection against the Plaintiffs.

"The first of these objections was that the Defendants' answer, in paragraphs 13 and 14, distinctly charged the Plaintiffs with knowledge of *Glass's* borrowing the £40,000 from the Defendants as upon an unincumbered security, without giving the Defendants notice of their then lien of 1863 on the same property. As the Defendants' answer was filed in July, 1870, and as the Plaintiffs were both examined on their own behalf in December subsequently, without attempting to contradict these fatal allegations in the Defendants' answer, this Court cannot possibly displace the Defendants from their lawful rights in favour of Plaintiffs so conducting themselves.

"It is also to be remarked that, although all the Defendants' counsel called the Plaintiffs' attention to this fatal objection to the bill in the argument before me as Primary Judge, and although I expressly founded my decree on this point, among the others herein stated, yet the Plaintiffs' counsel have only put forth the extraordinary argument, viz., that these allegations, being contained in an answer by a corporation, are under the corporate seal only, and were not, therefore, entitled to any notice or explanation to satisfy the Court of the *bona fides* of the Plaintiffs as thus challenged by the Defendants.

"The other new and important objection to the Plaintiffs' bill is, that the Defendants have duly registered their letter of transfer on the 22nd day of August, 1870, under our Colonial Registration Statute, some hours before the Plaintiffs' solicitors registered the Plaintiffs' letter of transfer under the same statute, the Defendants and their solicitors thus having perfected to completion their long series of 'due diligence' as against the long series of laches and belated registrations, both in the Crown Lands Office and in the Registration Office, by the Plaintiffs and their solicitors.

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"It is quite clear that this prior registration by the Defendants has given them an indisputable priority by statute, in addition to all their other legal and equitable superiorities.

"Against these conclusive reasons for dismissing the Plaintiffs' bill the Plaintiffs have only urged a reiterated assertion at every hearing of this cause—first, that the Plaintiffs' bill is founded on *Carter* v. *Carter* (1); and secondly, that the Crown was a trustee for *Glass, quâ* pastoral Crown tenant, and that such trusteeship was fixed upon the Defendants by their lending their £40,000 to *Glass* on the security of his letter of transfer.

"To the first of these arguments I reply that the doctrine of *Carter* v. *Carter* is applicable only to mortgagors and first and second mortgagees having priority of estate under the same title, and that the rule of *Carter* v. *Carter* is founded on real property law and equitable principles utterly inapplicable to the circumstances of these transactions between *Glass* as pastoral Crown tenant and the Plaintiffs and Defendants, if indeed any technical rules of English equity as between first and second mortgagees could be applied to the contrasted conduct of these Plaintiffs and Defendants at the dates of their loans to *Glass*. I think that, as there are no deeds of these pastoral runs, nor other *indicia* of ownership, except mere possession and payment of rent to the Crown, the equitable principle of *Dearle* v. *Hall* (2) ought to govern the rights of these mortgagees—that is, the dates of their notices to the Crown Lands Office should fix their equitable priorities.

In my opinion it is of the utmost importance for this Court to maintain that the Crown lands of this colony are held by Her Majesty only for disposition under the *Constitution Act*, and as now directed to be disposed of under the *Crown Lands Act* of 1861, in substitution for the old Orders in Council; and that this Court should not attempt to oust Crown tenants like these Defendants, who have acquired their leases strictly in accordance with the Crown regulations, and who advanced their moneys with perfect *bona fides* in all respects, and especially on the faith of these regulations being observed both by the Crown and by the pastoral tenant borrowing their moneys.

"Moreover, as the Crown lease has now been issued to and is vested

(1) 3 K. & J. 617. (2) 3 Russ. 1.

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in the Defendants as the accepted tenants of the Crown under the Defendants' prior registration at the Lands Office, there cannot be the slightest pretence for asserting that the Defendants as Crown tenants are to be held to have acquired their lease and paid their rents thereunder as involuntary or constructive trustees for the Plaintiffs, because every step they have taken has been adverse to the Plaintiffs, in confirmation only of their own undoubted security, and, as honest mortgagees, getting in the legal estate, which was undoubtedly equitably pledged to them in 1868 for £40,000, without the slightest suspicion of the Plaintiffs' latent security of 1863."

The present appeal was against the decision of the 7th of July, 1871.

Mr. *Cotton*, Q.C., and Mr. *J. D. Wood*, for the Appellants :—

It is not necessary to perfect the assignment of an equitable interest in land that notice should be given to any one. The *Crown Lands Occupation Act* and the regulations made under it were not made with the intention of interfering with ordinary rights already acquired. It was intended that, upon the recording of a transfer in the Crown Lands Office, the equities of the parties claiming through the transferor should remain intact, but that all subsequent to such recording should be barred. The Court will not, unless compelled, come to the conclusion that the Act was meant to defeat prior interests. Our equity against the Respondents rests on the prior transfer. Regulation 28 does not require notice to be given, but merely that a certain record shall be made, and it declares that such record shall have a certain effect. It enables the party entitled to the lease to take proceedings and get his lease completed, but it does not make it a legal transfer.

The statute (sect. 36) gives power to the Governor to make regulations, but it is not competent for him to provide that the legal estate shall be conveyed in a certain manner. The statute gives a right, not to a legal estate, but a right to be completed by the Crown. The Act delegated to the Governor the power to provide forms and proceedings. The word "proceedings" points to form, not to regulation of rights. Although all these rights are the creation of the statute, still it does not exclude the operation of the general law. Some parts of the regulations made by the

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Governor are *ultra vires*, and though he has issued them the Courts have to determine their effect. The words "the right to the lease will become vested," &c., are *ultra vires;* it is merely an expression of the Governor's opinion. "Valid and effectual" may apply to what shall be recognised in a Government office, but the Courts of Law can only regard it as an expression of the Governor's opinion. It is not said that no one shall transfer otherwise than as is mentioned in the statute, but only that if you act in a certain manner certain consequences will follow. The letter of transfer and the letter of deposit make up, in the whole, the transfer to the Appellants. By virtue of it the right of *Glass* to receive a lease from the Crown had been transferred to the Appellants, and he was no longer entitled to receive a lease when he dealt with the Respondents.

The Government could not have deprived the creditors in bankruptcy of such a security. The regulations are within the powers conferred on the Governor so far only as they are directory, but not where they state that certain acts are to have a particular legal effect. The Governor could not annex legal consequences to certain acts or omissions. He could not legislate. Our rights arise not under the regulations, but under the ordinary law. The promise of the Crown to grant a lease is like the promise of any other party; the rights are not different because the promiser is the Crown.

When these regulations were passed there was already a general Registration Act, not one affecting Crown lands only. The registration effected on the 15th of July, 1870, pending the suit, was invalid.

Mr. *Dickinson*, Q.C., Mr. *Fitzjames Stephen*, Q.C., and Mr. *Arthur Kekewich*, appeared for the Respondents; but their Lordships, without hearing them, proceeded at once to pronounce their judgment, which was delivered by

THE LORD CHANCELLOR:—

The only question, as it appears to their Lordships, deserving or requiring much consideration so far as they have thought it right to go into the arguments is, whether or not the 28th Regulation was *intra vires* of the authority which made it. A doubt upon that subject seems to have been suggested in some of the judg-

ments delivered in the Court below, and it has been argued here that the power given by the 36th section of the *Crown Lands Occupation Act* of 1861 was only to provide for matters of form, and not to provide for any matters of substance, and particularly not to determine how and in what matter effectual transfers of rights to have leases granted under the Act might be made.

After considering what has been said upon that subject, both by the learned Judges in the Court below—at least by those of them who appear to have favoured that view—and by Counsel at the Bar, their Lordships are unable to concur in that opinion. This Act, the *Crown Lands Occupation Act* of 1861, is upon a subject evidently of very great and general importance in the colony. It was intended to alter, and in a great measure to supersede, previous modes which had been established by law in the colony of dealing with Crown lands, under regulations referred to in the 4th subsection of the 12th clause of the Act. This Act itself consists of only 37 sections; it is a comparatively short Act; it lays down certain leading rules, and manifestly is not intended to exhaust or to provide for all the supplementary regulations which would be convenient or proper to be made in respect of the rights which it, to a certain extent, constitutes and regulates. Upon the particular subject of transfer it says not one single word. It distinguishes three kinds of rights: first, the rights to old runs as to which no payments shall have been made, entitling the holders of them to convert them into five-years' leases; secondly, the rights of those persons who, having been holders of old runs, have taken the necessary steps under the 13th clause to convert them into five-years' leases; and, lastly, the rights of those persons who have completed their title by taking actual leases. As to the mode in which these things are to be done, as to the power of transferring all or any of those rights, and the mode in which they shall be transferred, and the facts which are to bring the Government into privity of contract with particular persons, not originally entitled, in respect of those rights, the clauses of the Act are silent; but they contemplate a supplement for every purpose convenient and necessary, consistent with the provisions of the Act, and not expressly provided for by regulations to be made in a matter inappropriate to things merely formal, but usual and very familiar

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in this country, as well as in the colonies, when matters substantial as well as formal are to be governed by regulations to be made by a delegated authority, and not by the immediate action of Parliament itself; that authority in this case being the Governor with the advice of his executive council. The regulations are to be published in the *Gazette;* and thereupon, by virtue of the Act itself, they are declared valid in law; and this security is taken, which is very usual in such cases, but neither usual nor necessary as to mere matters of form, that a copy of every such regulation shall be, within a short limited time, laid before both Houses of Parliament, that they may be advertised of the manner in which the persons to whom they have delegated this legislative power have exercised it; and, if they disapprove of that manner, may take the proper steps to interfere. If these regulations, properly construed, are found to be reasonable and convenient regulations for carrying the Act into full effect, though they may govern not only the form but the effect of instruments of transfer of those rights which precede the grant of leases; if they are found to relate to matters arising under the provisions of the Act, which they unquestionably do; if they are found to be consistent with the provisions of the Act, which they unquestionably are; and if they are not in the Act expressly provided for, then their Lordships cannot do otherwise than come to the conclusion that they are valid in law, and that there is no ground for the objection that they are *ultra vires.* If indeed the Act had said that in any other manner these rights now in question should be transferred, then any regulation inconsistent with that enactment would necessarily have been *ultra vires* and void; but the whole subject of transfer is left open to subsequent regulation by the enacting clauses of the statute; and in their Lordships' opinion it was a proper and indeed a necessary subject to be regulated, for otherwise nobody would have known who were or who were not to be regarded and treated as in privity of contract with the Crown concerning these important rights. The regulations appear to their Lordships to be perfectly and entirely reasonable: not only reasonable, but such as alone would be likely to accomplish the objects of the statute, as far as transfers are concerned, without such inconveniences as it might be expected the proper authority would provide against.

If that is the conclusion to be arrived at, what is the effect of those clauses? They deal with the very case which is before their Lordships, the case of a holder of a run of which the lease has not issued. The clauses are headed "transfers," and their object is to shew how the inchoate right to this lease, so described, may be transferred. The holders may have their rights to call for leases transferred by an application addressed to the Chief Commissioner of Crown Lands, and authenticated in a particular manner. It has not been alleged in argument that this application was not authenticated in the manner required by the regulation; and their Lordships, therefore, must assume that that point could not successfully be made. Assuming that the authentication contemplated by this 28th Regulation was not absent, then we have a case in which the only person known to the Crown, or who could possibly be known to the Crown consistently with this regulation, as the holder of this run of which the lease had not issued, did make the application, contemplated by this 28th Regulation, to the Chief Commissioner of Crown Lands, with the concurrence of a party interested as a transferee for value, who desired to have his transfer recorded. Now, what was the effect of this according to the true construction and meaning of these regulations? "On such application being recorded, the applicant will be,"—therefore in this case he was—*Glass* was—"debarred from all further claim to the lease, the right of which will thenceforth become,"—therefore in this case became—"vested in the transferee,"—the Respondents; and under the 31st clause that transfer carried with it all rights of the transferor, *Glass*, in connection therewith, with an exception not material to the present case.

Now it appears to their Lordships that unless there was something which, on equitable principles, would affect the transferee himself, his title could not possibly be called in question in consequence of any dealing, not being a transfer under that regulation, which had previously taken place before the transfer to him was made. There is nothing whatever in these regulations, and of course there is not intended to be anything in their Lordships' judgment, which would in the slightest degree whatever affect or prejudice any equity which could be asserted as against the transferee. He, as transferee, succeeds to the title of the transferor;

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but if his conscience is bound by contract, by trust, or by anything else which in a Court of Equity is equivalent in point of binding effect, there is nothing here to prevent him from taking *sub onere*. But this is not a case in which anything of that kind is pretended; what is alleged here is this, that some other person had in his possession a document which in equity affected the interest of Mr. *Glass*, the transferor, and that, for that reason, Mr. *Glass* was no longer the person entitled to the lease within the meaning of this 28th Regulation; that he could not make the application; and that the right which became vested in the transferee was a right, if any, subject to that prior equitable interest which Mr. *Glass* had previously created. The argument, if good, really would be equally good though no notice whatever had been given to the transferee of the existence of that prior equitable interest; but its effect is entirely to destroy the whole regulation, by treating as a transferee a person who has not complied with it, treating him as having acquired such an equitable right as would make the transferor, the original holder of the run, no longer the person entitled to go to the Crown and ask for the lease. The person entitled to the lease must mean, and does mean, the person entitled at that time to go to the Crown and ask for the lease. The alleged prior equitable transferees could not put themselves in that position under this regulation except by doing the thing which the regulation prescribes, which thing they had not done. The Crown, therefore, must have ignored them, must have granted the lease, unless the regulation were violated, to Mr. *Glass*, if no application in favour of a transferee had been made. *Glass* was the person entitled to apply to the Chief Commissioner;—he did apply; and upon that application he was debarred; all persons standing behind him, who claim only through him, were debarred also: and the right thenceforth became vested in the transferee, subject, of course, as has been said, to any personal equities by which that transferee might have been bound.

Now what was the nature of that right? It is a fallacy to call it an equitable right. It was a statutory right, and there is nothing higher among legal rights than a right created by statute. It was a legal right, one consequence of which was, no doubt, that the owner of that legal right could call upon the Crown, in which,

until a lease was granted, the legal estate in the land would remain, to execute a conveyance of the legal estate in the land by way of lease. But it was a legal right created by statute, and, therefore, an absolute right, subject to the statutable conditions, to call for that conveyance; and that legal right with all its consequences, including the title to call for the conveyance, was by the express terms of these regulations transferred to the transferee. The matter, therefore, seems very clear, if there be no equity as against these Respondents personally, and it is admitted there is none. There is nothing more familiar than the doctrine of equity that a man, who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title, if he can, and may hold it; though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself. That is alleged to have happened in this case; but it is admitted that there is nothing in that state of the case, if a legal right was transferred, to prevent the transferee from holding it for his own benefit; and, indeed, the facts quite justify, in their Lordships' opinion, the observation of Mr. Justice *Hargrave* that the whole merits and real substantial equity and justice of the case are with the Respondents. For what has happened? The documents said to have created this prior equitable interest in the Appellants—which in truth are nothing whatever but this, a letter addressed to the Commissioner of Works for the purpose of effecting a transfer, and another saying that this is given by way of security—those documents, having been delivered to the Appellants in July, 1863, and April, 1864, are kept in their custody, and nothing whatever done with them for several years. In the interval, the Appellants leave *Glass*, from whom they received those documents, to continue to deal with all the world as the ostensible owner of the run. He does the important act, during that interval, on the 31st of December, 1865, of changing the title from one species to another, from the right to a mere run into the right to a five years' lease. That is done by *Glass* as the person entitled, and the Crown knew nobody but *Glass* in the matter; and *Glass*, so left in the position of the

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ostensible and reputed owner, and the person who under the 28th Regulation would be able in every action or suit at law or in equity for every purpose, offensive or defensive, to go into Court with the Crown contract in his hand and use it as if it were an actual lease, —he being left by the Appellants in that situation, gets £40,000 from the Respondents in April, 1868, at which time it is not pretended they had any notice or means of knowledge whatever of these latent securities in the Appellants' hands. If there ever were persons who were entitled to the benefit of the principle of equity, that having paid their money *bonâ fide* without notice they might afterwards get in the *tabulam in naufragio* if they could, the present Respondents are persons in that situation; and it would be monstrous, as it appears to their Lordships, unless the matter were in some degree rendered less important by the Registration Acts of the colony, (a point into which their Lordships do not think it necessary to go,) if in a colony of this description rights of this kind, regularly perfected by following out the statutory formalities as between the Crown and transferees who have dealt *bonâ fide* for value with the only person known as owner to the Crown, and who had come to be recognised by the Crown in that way,—if they could be ousted by latent documents kept in the chests of bankers or other persons in *London,* and only intended to be used at such time and in such manner as might happen to suit their convenience.

It appears to their Lordships that the law and the justice of the case are upon this first ground alone entirely and altogether with the Respondents, and that it is quite unnecessary to go into the subsequent points which might otherwise arise, when the legal title so initiated is found to have been further perfected by the actual grant of a lease before suit by the Crown, and subsequently after suit by priority of registration in the land or deeds register.

Their Lordships think it unnecessary to go into those points, because they entirely agree with what was said by Mr. Justice *Hargrave* in his judgment, that "it is of the utmost importance for this Court to maintain that the Crown lands of this colony are held by Her Majesty only for disposition under the *Constitution Act,* and as now directed to be disposed of under the *Crown Lands Act* of 1861, in substitution for the old Orders in Council, and that

this Court should not attempt to oust Crown tenants like these Defendants, who have acquired their leases strictly in accordance with the Crown regulations, and who advanced their money with perfect *bona fides* in all respects, and especially on the faith of these Regulations being observed both by the Crown and by the pastoral tenant borrowing their moneys." Their Lordships also agree with the substance, (as they understand it,) of what Mr. Justice *Hargrave* states at the beginning of that judgment to have been his chief ground for originally dismissing the Plaintiffs' bill; that, "as to the broad and substantial contest between these parties, the Plaintiffs were entirely without any equity as against the Defendants, while the Defendants had a clear and undisputable equity against the Plaintiffs by having advanced their £40,000 to *Glass* in 1868, without any notice or knowledge, express or implied, of the Plaintiffs' prior lien originating in 1863, and were prevented by the Plaintiffs from obtaining any such knowledge by the wilful neglect and omission of the latter to record their letter of transfer at the Lands Office till after the Defendants had advanced their £40,000, and after the Defendants' letter of transfer had been duly recorded there." If indeed the learned Judge were to be understood as meaning in that passage to suggest any attempt or intention by the Plaintiffs to mislead the Defendants, their Lordships have heard nothing which would lead them to adopt any such view, nor is any such view meant to be implied in any word which has been said; but it does not at all seem necessary to put that construction upon the language of Mr. Justice *Hargrave*. That language may very well mean this, with which their Lordships entirely agree, that the Appellants did not think fit to use the documents of title which they had obtained; they intentionally left *Glass* in the position of an apparent owner, able to give to others, with the legal title, the better equity; and therefore it is just and equitable that they should bear the consequences.

Their Lordships therefore will humbly advise Her Majesty to dismiss this appeal, with costs.

Solicitors for the Appellant: *Domville, Lawrence, & Graham.*
Solicitors for the Respondents: *Freshfields.*

J. C.*
1874
Feb. 5.

THE PORT CANNING LAND, INVESTMENT, RECLAMATION AND DOCK COMPANY, LIMITED, A COMPANY REGISTERED UNDER ACT XIX. OF 1857 (PLAINTIFFS) . . . . . } APPELLANTS;

AND

A. SMITH, ESQUIRE, CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE TOWN OF CANNING (DEFENDANT) . . . . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM, IN BENGAL.

Contract constituted by Correspondence—Indian Registration Act, 1866—*Distinction between new Terms in Contract and Matters only affecting Mode of Performance.*

A. held debentures of *B.*, a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to *B.*; the rent of which lots was to be set off against the interest on the debentures. *A.* notified to *B.* that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. *B.* consented to *A.*'s proposal, and at the same time informed *A.* that the selected lots exceeded the value of his debentures, and that he must pay the difference. *A.* made no reply to this communication.

A. afterwards sued *B.* for interest on the debentures:—

Held, that *A.* was not entitled to interest, the contract being complete, and the indication by *B.* of the difference in quantity not amounting to an introduction of a new term into the negotiation.

A correspondence between *A.* and *B.* amounted to a contract for a purchase of a future interest in immoveable property:—

Held, that such correspondence did not require registration under the *Indian Registration Act*, 1866.

IN this case the plaint sought to recover from the Respondent, as Chairman of the Municipal Commissioners of the Town of *Canning*, the interest alleged to be due upon a number of municipal debentures issued by the said commissioners, and held by the Appellant company.

The main defence was, that under arrangements between the company and the municipal commissioners the debentures were

* *Present*:—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR LAWRENCE PEEL.

to be commuted for land, the company agreeing to pay the commissioners a quit-rent equivalent to the amount of interest on the debentures; that the debentures were issued on certain terms of which the company had elected to avail themselves, and that they could not now claim the interest.

There was also a technical defence on the ground that no notice of action had been given to the Defendant as required by the Act, No. III. of 1864, s. 87, of the *Bengal Council.*

Mr. Justice *Phear*, Judge of the High Court at *Calcutta*, in its ordinary civil jurisdiction, decreed in favour of the Plaintiffs, assessing the damages at Rs.27,522.

On appeal, a Division Bench of the High Court, on the 20th of September, 1869, reversed that decree and dismissed the suit with costs. From that decree the present appeal was brought.

In 1850 the Government of *India* passed an Act to enable improvements to be made in towns, whereby commissioners could be appointed to manage the affairs of any town, with full power to make all necessary contracts, levy taxes, &c., for the purpose of carrying out the Act.

Such persons were known as "Municipal Commissioners," and, in accordance with the Act, certain persons were appointed to act as such commissioners for the town of *Canning*, a new port on the river *Mutlah*, near *Calcutta*.

In 1863 these municipal commissioners, with the sanction of Government, proposed to raise loans on debenture for ten lacs of rupees, and they issued a notice, which contained the following passages:—

"The Municipal Commissioners of *Canning*, with the sanction of Government, are prepared to receive sealed tenders for loans on debenture for ten lacs of rupees for the general improvement of the town and port of *Canning*, and the lands adjoining thereto, on security of the properties of the municipality as described in the annexed schedule, and on the credit of the existing rents of lands, and of the rents, rates, and taxes that may be hereafter imposed and levied on account of the municipal fund under the provisions of Act XXVI. of 1850, or of any other Act that may be passed by the Legislature. The tenders are to be for sums of not less than

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Rs.600. The debentures will have a currency of five years, and carry interest at the rate of 5½ per cent. per annum from their respective dates. Interest to be paid half-yearly, on the 30th of June and the 31st of December, at the *Bank of Bengal*.

"Debenture holders are to be entitled to convert their debentures to the extent of one-half of the entire loan raised, into leasehold titles to lands in the town, within a period of two years from the issue of the debentures, at the rate of Rs.600 of loan for one beegah of ground. Such privilege of conversion to be given to debenture holders in order of the dates on which applications for such conversion are received by the commissioners. The leasehold title so conferred to be for sixty years on a rental of Rs.30 per beegah per annum, such leaseholders to be further allowed to convert their leasehold into freehold tenures by a cash payment at the rate of Rs.600 per beegah, provided such privilege be claimed within four years from the 1st of January next, and the privilege of conversion to be retained during the remaining currency of the lease, but at a rate per beegah to be fixed at intervals of four years on a review and estimate of the then value of the leases, such value to be determined by the commissioners. Existing leaseholders who become holders of debentures may, under like conditions, convert such debentures at once into freehold tenure of their present leasehold property at the rate of Rs.600 per beegah.

"Schedule Properties.

"Soonderbun Grant, No. 54.

"1. 678 beegahs of ground already let out for Rs.7800 per annum.

"2. About 4196 beegahs of ground in the town not yet leased out.

"3. 13,121 beegahs of ground outside the present town limits partly let out to ryots and grantees, and yielding an annual rent of Rs.2,716.

"Reserved portion of Grant No. 50.

"1,951 beegahs of land of which about one-half is out on temporary leases.

"By order of the Board.

"*S. H. Robinson*, Honorary Secretary to the Municipal Commissioners."

In March, 1864, an Act was passed by the Council of the

Governor of *Bengal* extending the powers of municipal commissioners, the new powers granted to them being very large, and the 87th section of that Act provided that no action should be brought against the municipal commissioners, or any of their officers, or any person acting under their direction, until one month's notice had been given in writing. The section proceeds "and until such notice be proved, the Court shall find for the Defendant."

In July, 1864, the provisions of that Act were extended to *Canning*.

On the 23rd of January, 1865, a company formed by one Mr. *Schiller* was registered under the name of the *Port Canning Land, Investment, Reclamation, and Dock Company, Limited*, and the prospectus stated that the company was formed with the object of securing land in *Canning*, and improving it by building, letting, or selling.

It also stated that the company would undertake the construction of public works, and that it had obtained from the municipality extensive rights.

It then proceeded thus:—

"In addition to the above concession, the company had subscribed £25,000 to the 5½ per cent. Municipal Debenture Loan at 15 per cent. discount, with option to exchange within two years these debentures for land in the town of *Canning*, at the rate of Rs.1800 per acre in leasehold, and Rs.3600 per acre in freehold, and upon the condition, that for the present the municipal loan be closed."

It appeared that, irrespective of the land to be thus obtained, the company already held certain town lots at *Canning*, registered in the name of the company.

Among the directors of the company were Mr. *Schiller*, Mr. *Kilburn*, Mr. *Whitney*, and *Baboo Ram Gopaul Ghose*, all of whom were Municipal Commissioners for *Canning*.

On the 13th of March, 1865, the new company wrote to the municipal commissioners in the following terms:—

"To the Acting Secretary to the Municipal Commissioners
"for the Town of *Canning*.

"Sir,—We are instructed by the directors of the company to inform you that in lieu of the debentures which are to be given for

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the amount subscribed by them to the loan of the Commissioners of the Town of *Port Canning*, they desire to possess land in lots adjacent to the proposed new dock, and such other lots near to the railway, or in other desirable situations belonging to the commissioners, to such an extent as may be equivalent of said amount of loan.

"The numbers of the lots more especially referred are noted below.

"We further beg to inform you that we are now prepared to pay in the sum of two and a half lacs agreed on 21st March.

"Lots 148 to 153,
162 „ 164,
83 „ 84,
199 „ 233,
169.

"We are, dear Sir

"Yours faithfully,

"*Borradaile, Schiller, & Co.*

"Secretaries and Treasurers."

On the 22nd of March, 1865, the company paid in Rs.250,000, and Rs.200; minus 15 per cent. discount: and subsequently received from the municipal commissioners 123 debenture bonds, representing Rs.250,200.

The following is a copy of one of the debentures, all being in a similar form:

"The Municipal Commissioners of the town of *Canning*.

"No. 268.

"The 22nd day of March, 1865.

"By virtue of the Act No. III. of 1864 of the Council of the Lieutenant-Governor of *Bengal*, for making laws and regulations (the *District Municipal Improvement Act*), we, the Commissioners of the Town of *Canning*, in consideration of the sum of six thousand rupees, paid to us by the *Port Canning Land Investment, Reclamation, and Dock Company, Limited*, of *Calcutta*, promise to pay to the said *Port Canning Land, Investment, Reclamation, and Dock Company, Limited*, or order, the said sum of six thousand rupees, five years after the date hereof, together with interest thereon at the rate of 5½ per cent. per annum, payable half-yearly on the 30th day of June and the 31st day of December in each year.

"*A. Bainbridge*, Chairman.

(Seal of the Municipal Commissioners.)

"*Alexr. Pendleton*, Commissioner."

In January, 1866, Mr. *Kilburn*, who held other municipal debentures, being desirous of exchanging them for land lots, the municipal commissioners wrote to the company requesting to know whether the directors wished to select for the company any of the lots named by Mr. *Kilburn;* but no reply having been received, the Commissioners on the 18th of September, 1866, wrote the following letter to the company:—

"*J. R. Thomson*, Secretary and Commissioner, to the Secretaries
"and Treasurers *P.C.C.B.*

"18/9/66.

"Gentlemen,—I am directed by the chairman to request that you will give your immediate attention to the following:—

"On the 13th March, 1865, the *P. C. Company*, through you, applied distinctly to have lots assigned to them in 'lieu of the debentures which are to be given for the amount subscribed by them to the loans.' You applied specifically for Lots 148 to 153,
162 „ 164,
83 „ 84,
199 „ 233,
169,
and asked for other land in lots adjacent to the proposed new dock, and such other lots near to the railway, or in other desirable situations, to such an extent as may be equivalent of said amount of loan.

"2. This is a distinct and formal intimation that the *Port Canning Company* avail themselves of the privilege allowed to debenture holders by Article V. of the published conditions of the loan.

"3. No formal letter was sent to the *Canning Company* on receipt of their application placing the specified lots at their disposal, but on the 5th of January, 1866, the secretary to the municipal commissioners wrote to the secretaries of the *Canning Company*, requesting that they would intimate what lots they required among certain numbers specified in the letter, as Mr. *Kilburn*, another debenture holder, had applied for lots, and the commissioners could not tell Mr. *Kilburn* which of the lots were available until the *Canning Company* had made their selection.

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No reply was received from the *Canning Company* to this request, but in April, 1866, the secretary to commissioners addressed Mr. *W. C. Stewart*, acting on behalf of the *Canning Company*, on the subject. To this letter also no reply was returned.

"4. The lots applied for by *Port Canning Company* in commutation of their debentures have always been considered as transferred and held at the disposal of the *Port Canning Company*, and it now only remains for the leases to be completed and debentures to be sent into this office to the value of Rs.204,928, being the amount of the loan which these lots represent under the 5th Article of the published conditions of the loan.

"5. These lots being held available for the *Port Canning Company* at any moment, the commissioners are, by the application of the company, precluded from making any other use of the lots, and thereupon the commissioners must call on the company to return debentures representing the value of these lots, and to enter into the necessary formal engagements as to the conveyance of the land to them, under the 5th Article of the published conditions of the loan.

"Under the circumstances the municipal commissioners cannot be held liable for any interest which may accrue on the amount of loan represented by these lots, and the commissioners must look to the company in future for the payment of the rental due on the lots under the 5th Article of the published conditions of the loan.

"I am further directed to request that your company will without further delay select such other available lots as may be required to make up the redemption of the entire sum subscribed by them to the loan, and to give notice that the commissioners repudiate any liability to pay interest on the amount subscribed by the *Canning Company*, or to repay the loan, except in the shape of grants of land, as applied for by the company in their letter of the 13th March, 1865.

"I must, therefore, urge on behalf of the commissioners that you will select without further delay these lots, as they have received numerous other applications for lots in commutation of debentures, to which I can give no definite reply until the *Canning Company* act on the right of first selection, which is secured to them by their having been the first applicants."

On the 20th of December, 1866, Mr. *Schiller* wrote the following letter to the municipal commissioners:—

"To *J. R. Thomson*, Esq.,
"Secretary to the Municipal Commission, *Port Canning*.
"*Calcutta*, 20th Dec., 1866.

"Sir,—With reference to the debentures held by the *Canning Company*, which I agreed to exchange for land, I now beg to propose that such exchange be deferred till their due date.

"This will involve the payment of interest by the municipality to the *Port Canning Company*, but the latter is prepared to declare now the lots they will receive in exchange for debentures and to pay a quit rent thereon, equivalent to the interest payable on their debentures. The municipality will thus lose nothing, and the arrangement will be a convenience to the *Canning Company*.

"I beg you will submit this proposal to the commissioners, and I trust they will give it their assent, and recommend its adoption to Government, whose sanction may possibly be required."

On the 14th of March, 1867, the municipal commissioners, by their vice-chairman, replied to that letter in the following terms:

"Dear Sirs,—With reference to the letter from Mr. *Schiller*, dated the 20th December, 1866, copy of which is on the other side, I am instructed by the chairman, Municipal Commissioners of *Canning*, to state that they agree to the proposal contained in that letter, and to request that you will at once declare the lots which your company will receive in commutation of the debentures taken by your company, so that the commissioners may know exactly the lots which they are bound to hold for the company."

On the 2nd of April, 1867, the company wrote as follows to the chairman of the municipal commissioners:—

"Sir,—In reply to your letter of the 4th [14th?] of March, regarding the lots to be taken by this company in commutation of the debentures which you issued to us, we beg to inform you that the directors propose to take the following lots, which they think will amount to about the sum of Rs.250,200:—

"C to 10A, 27A, 28A, 29A, 33 to 38A, 48 to 50A, 83, 84, 85, 86, 151 to 162, 196 to 203.

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"The directors desire us to say that they expect permission will be granted to them to make an exchange of any of the lots for any others which may still remain in the possession of the municipality at any future period."

To this communication the vice-chairman of the commissioners replied on the 22nd of August, 1867, in the following terms:—

"To the Secretaries and Treasurers of the *Port Canning Company*.

"Gentlemen,—I am requested by the chairman to inform you that the lots specified in your letter of the 2nd April, 1867, are reserved for your company in commutation of the municipal debentures to their value, viz., subject to the sanction of oveGrnment:—

"Lots 6A to 10A	5 Lots	South of Railway.
„ 27A „ 29A	3 „	
„ 33A „ 38A	6 „	
„ 48A „ 50A	3 „	
Total	17 Lots	
"Lots 83 to 86	4 Lots	North of Railway.
„ 151 „ 162	12 „	
„ 191 „ 203	8 „	
Total	24 Lots	

"In all forty-one lots, which the commissioners deem to be equivalent to Rs.305,407 of loan.

"2. Your calculation as to lots is incorrect. The redemption into freehold is Rs.1,200 per beegah. I enclose the account according to the usual valuation of the municipal property.

"3. This concession is granted on the full understanding that the debentures to the above extent are to be returned at maturity, and that rent equivalent to the interest claimable on the said amount of debentures shall be paid for lots until the redemption into freehold tenure shall be completed. In the meantime the commissioners will be prepared to execute the necessary formal leases required, inserting a clause to give the required effect to the request conveyed in your letter, dated the 20th December, 1866.

"I have to add, that the commissioners will not object to your exchanging the lots named upon application for any others that may not be occupied by their own buildings or by other persons at the time such application shall be made."

On the 10th of January, 1868, the company sent to the municipal commissioners a bill for Rs.13,761, being the amount of interest accruing on the debentures from the 1st of January to the 31st of December, 1867, requesting payment thereof, and stating that if they would forward their rent account for the town lots registered in the name of the company it would be circulated to the directors. To this the chairman of the commissioners replied, stating that he would send a bill for their claim for the rent of the town lots as well as those selected by the company in lieu of the debentures, and pointing out that the latter were, by the agreement between the commissioners and the company, to be returned upon maturity, the interest thereon being set off against the rents of the lots selected.

On the 23rd of April, 1869, the company again demanded payment of the interest from January to December, 1867, and also for the year 1868, to which the Respondent, Mr. *Smith*, as chairman of the municipal commissioners, replied, pointing out that the interest was to be set off against the equivalent quit rent payable to the commissioners for the land allotted in lieu of the debentures, and offering, if they actually wanted to have the interest paid, to pay the same on receiving from the company payment of the counter claim.

On the 18th of May, 1869, the company, without any notice, commenced the present action against the Respondent, as chairman of the municipal commissioners, by filing a plaint in the High Court in its original civil jurisdiction.

The plaint sought to recover the interest due on the debentures held by the company for 1867 and 1868.

On the 5th of July, 1869, the chairman of the company filed a written statement setting out a copy of one of the debentures and a copy of the letter of the 23rd of April, 1869, claiming the interest.

On the 9th of August, 1869, the Respondent, as chairman of

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the municipal commissioners, also filed a written statement, by which he submitted that no interest could be recovered unless the company paid an equivalent sum in the shape of quit rent, which they had not done.

The company called three witnesses, and put in certain documentary evidence, amongst which were a letter demanding interest in August, 1867, and a reply from the vice-chairman of the commissioners, both of which letters were previous to the commissioners' letter enumerating the lots set apart for the company.

On the 23rd of August, 1869, Mr. Justice *Phear* gave a decree in favour of the Plaintiffs for Rs.27,522 with costs. The learned Judge was of opinion that there had been nothing in the correspondence to constitute an agreement by the Plaintiffs to pay rent for specified land equivalent to interest on the debentures in respect of which they sued. He also thought that the correspondence was not admissible in evidence for the purposes of the Defendants, because no part of it was registered. In the way in which Defendants desired to use this correspondence, it must amount to a lease of specified lands, or an agreement for a lease under such circumstances that rent mentioned in it had become a rent due to Defendants, and capable of being set off against Plaintiffs' claims. If it were a lease, inasmuch as completion of this contract did not take place till the letter of the 22nd of August, 1867, it must fall under the operation of the *Registration Act*, 1866, and under that Act a lease is one of the documents which must be registered, otherwise it could not be used in a Civil Court for any purpose. If it was an agreement for a lease, it must also be registered by reason of the interpretation clause.

The Respondent having appealed against that decree, the Chief Justice and Mr. Justice *Macpherson*, sitting in appeal, reversed the decision, holding that the proposal which Mr. *Schiller* made to the commissioners was a proposal by which the commissioners were to be relieved from any loss by postponing the exchange until the due date of the debentures. That the *Port Canning Company*, according to the terms of this proposal, were not to receive the lots immediately, but that the receipt of the lots by them was not to be complete until the debentures were exchanged for them;

but although they were not to receive the lots, they then agreed to declare the lots they would receive in exchange of the debentures, and to pay a quit rent thereon equivalent to the interest on the debentures. There was no stipulation whatever that the quit rent was not to commence until the lots should be exchanged for the debentures, but all they were willing to do was to name the lots they were to receive, and to pay a quit rent thereon. That the municipality on the 14th of March, 1867, accepted that proposal; and that the ascertainment of the lots to be taken over, and of their value, were matters left to be subsequently arranged, and the latter correspondence related to those matters only. Against that decision the present appeal was brought.

Mr. *Cowie*, Q.C., and Mr. *Doyne*, for the Appellants:—

The original offer of the Appellants was limited to the subscription for a certain amount of debentures, and the commutation of those debentures for land. Their offer for certain lots was quite clear, but it was not accepted. Up to the 22nd of August, 1867, there was no contract; and afterwards there could be none, for the letter of that date puts much more land on the Appellants than they ever offered to take; that is to say, it introduces a new term into the proposed contract. The Respondents asked the Appellants what lots they would take, and then assigned to them different lots. The Respondents confess and avoid; that is, they say that the Appellants agreed to forego interest on the debentures. They do not specify the date of the supposed agreement, nor for what period it would put an end to the claim for interest. A person alleging a contract must prove a simple acceptance of the proposal, without any new term. It was not a mere difference of calculation, for the amount of the subscription was fixed from the beginning, and the advance from £25,000 to £30,000 was a material variance. The question is whether the contract is contained in the two letters of December 20th, 1866, and the 14th of March, 1867; or whether the letters of April 2nd, 1867, and August 22nd, 1867, are to be read along with the two just named. The four together embodying the whole transaction. The letters of the 18th of September and the 20th of December, 1866, speak of interest and quit rent as future: "On the 20th of December, 1866,

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we proposed to declare what lots we would take, and to pay quit rent." It still remained as a proposal only, till the lots should be declared. In April the Appellants made the declaration which the Respondent did not agree to. The interest was not to stop till the quit rent was ascertained. The quit rent could not commence till the lots were ascertained; and they never were finally agreed upon. If the correspondence is tendered as amounting to a contract, we say that under the *Indian Registration Act*, 1866, sect. 17, it is inadmissible as being unregistered, while it creates a future interest in land.

Mr. *Benjamin*, Q.C., and Mr. *J. D. Bell*, for the Respondents:—

The Appellants had secured the first choice of lots; they desired to have certain lots, the price of which would be more than the amount of their debentures. They made their proposal. They were asked what lots they preferred. They held back, not being sure which lots would be the best. On the 20th of December, 1867, they applied for indulgence, acknowledging their engagement, but giving the Respondents to understand that the debentures were more useful to them for the present than the land would be. The contract was then perfect; but had it not been so, the answer of the 14th of March made it a perfect contract. The Appellants were afterwards apprised by the letter of the 22nd of August, 1867, that they had applied for more than they were entitled to; that the price was higher than they had reckoned, and that they must pay the excess. The later correspondence relates merely to the execution of the contract. They never replied to the letter of the 22nd of August, 1867. There is no letter which justifies their setting aside the contract. A correspondence like this, even embodying, as it does, the terms of a contract, does not constitute such an instrument as the Act intended to be registered.

At the close of the argument their Lordships' judgment was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the High Court of Judicature at *Fort William* in *Bengal*. It arises in an action brought

by a land company, called the *Port Canning Land Investment Reclamation and Dock Company*, against the Defendant, the chairman and representative of the Municipal Commissioners of the Town of *Canning*. The action is brought upon some debentures of the municipality which were given to the land company, and the claim in the action is for two years' interest, the interest being payable by half-yearly payments, from the 1st of January, 1867, to the end of December, 1868. The Plaintiffs have undoubtedly a perfect *primâ facie* case upon the debentures for that interest. The defence set up on the part of the municipality is, that there was an agreement come to between the land company and the municipality by which it was agreed that the debentures should be exchanged for land at the time when the debentures matured, which was a period of five years after their date, and that meanwhile, the exchange being alleged on the part of the municipality to have been completely contracted for, a quit-rent should be paid for the land equivalent to the interest which was accruing upon the debentures—the intention of the parties being that the interest should be extinguished by that agreement to pay the quit-rent.

The question in the appeal is, whether a complete and perfect agreement was come to between the parties to that effect. The case has been ably argued on both sides, with the result, which very often follows in a case properly argued, of reducing the point to be decided to a very narrow issue. The whole depends upon the correspondence; and the question is, whether the agreement relied on by the Defendants is established by some of the letters of that correspondence.

The company was formed, as appears by their prospectus, which has been referred to, for the purpose of obtaining land in *Port Canning*. The municipality appear to have considerable land in that town, and were desirous of making it a place of trade. They raised money by issuing debentures; but they gave the holders of those debentures the election to exchange them for land. That right of election is found in a notice which was issued by the municipal commissioners when they invited tenders for the loans upon these debentures. The 5th article of that notification is this:—"Debenture holders are to be entitled to convert their debentures, to the extent of one-half of the entire loan raised,

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into leasehold titles to lands in the town within a period of two years from the issue of the debentures, at the rate of Rs.600 of loan for one beegah of ground. Such privilege of conversion to be given to debenture holders in order of the dates on which applications for such conversion are received by the commissioners. The leasehold title so conferred to be for sixty years on a rental of Rs.30 per beegah per annum." Then a further option is given: "Such leaseholders to be further allowed to convert their leasehold into freehold tenures by a cash payment at the rate of Rs.600 per beegah, provided such privilege be claimed within four years from the 1st of January next."

The Plaintiffs, the land company, agreed to subscribe 2½ lacs of rupees and 200 rupees. That subscription was evidently made by them with the intention of exchanging the debentures they would obtain for land; for by a letter of the 13th of March, 1865, written before the debentures were issued, the company declared their desire to take land in lieu of them to the full amount of the loan.

Very soon after the debentures were issued, a correspondence commenced between the company and the municipal commissioners, with the object of effecting the conversion. The letters on both sides are unbusinesslike. Letters are written and left without an answer, and then a fresh departure is made without reference to preceding letters. That correspondence, in the way in which it has taken place, no doubt imposes some difficulty upon those who have to construe it; but, as I have already said, after the matter has been threshed out it really appears that the point is a very simple one. The first letter relating to the conversion, after the issue of the debentures, is on the 5th of January, 1866. It is a communication from the commissioners to the company, and is a spur to the company to exercise their option, if they mean to do it, of taking land. It is this: "Dear Sirs,—Mr. *Kilburn* having applied to have certain lots out of the following numbers assigned to him on freehold title in exchange for debentures, viz., Nos."—naming several numbers,—"I shall feel obliged by your intimating what lots amongst these numbers your directors desire to select and retain for the company, so as to enable me to inform Mr. *Kilburn* what lots will be available to

him for redemption." It seems no answer was given, but there was some intermediate correspondence respecting an alteration in the debentures, which it is immaterial to consider. The next letter is again from the commissioners to the company, of the date of the 18th of September, 1866. "Gentlemen, I am directed by the chairman to request that you will give your immediate attention to the following:—On the 13th of March, 1865, the *Port Canning Company* through you applied distinctly to have lots assigned to them in lieu of the debentures which are to be given for the amount subscribed by them to the loans. You applied specifically for lots,"—naming them—"and asked for other land in lots adjacent to the proposed new dock, and such other lots near to the railway, or in other desirable situations, to such an extent as may be the equivalent of said amount of loan." "This is a distinct and formal intimation that the *Port Canning Company* avail themselves of the privilege allowed to debenture holders by Article V. of the published conditions of the loan." The commissioners thus directly intimate to the company the construction they put upon their letter, viz. that they had elected to take land to the full value of their debentures. The letter goes on:—"No formal letter was sent to the *Canning Company* on receipt of their application placing the specified lots at their disposal; but on the 5th of January, 1866, the secretary to the municipal commissioners wrote to the secretaries of the *Canning Company*, requesting that they would intimate what lots they required among certain numbers specified in the letter, as Mr. *Kilburn*, another debenture holder, had applied for lots, and the commissioners could not tell Mr. *Kilburn* which of the lots were available until the *Canning Company* had made their selection. No reply was received from the *Canning Company* to this request, but in April, 1866, the secretary to the commissioners addressed Mr. *W. C. Stewart*, acting on behalf of the *Canning Company*, on the subject. To this letter also no reply was returned." Then they refer to another letter having been written—"The lots applied for by *Port Canning Company* in commutation of their debentures have always been considered as transferred and held at the disposal of the *Port Canning Company;* and it now only remains for the leases to be completed and debentures to be sent into this office to the value of

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Rs.204,928, being the amount of the loan which these lots represent under the 5th Article of the published conditions of the loan." Then the letter goes on to urge the completion of the exchange—"I am further directed to request that your company will, without further delay, select such other available lots as may be required to make up the redemption of the entire sum subscribed by them to the loan, and to give notice that the commissioners repudiate any liability to pay interest on the amount subscribed by the *Canning Company*, or to repay the loan, except in the shape of grants of land, as applied for by the company in their letter of the 13th March, 1865." There is thus a most distinct intimation on the part of the municipal commissioners that they hold and treat the *Port Canning Company* as having applied for an exchange of the whole of their debentures for land; that the company have only selected lots which amount to a part of the whole amount of their debentures; that they require the company to select the other lots and send in their debentures; and expressly give notice that from that time they do not consider themselves liable to pay interest.

Then come the two important letters, which cannot be fully understood without referring to this previous correspondence. The letter of the 20th of December, 1866, is from Mr. *Schiller*, who represents the *Land Company*, to the commissioners:—"Sir, with reference to the debentures held by the *Canning Company*, which I agreed to exchange for land,"—thus in answer to the letter, the effect of which I have given, which refers to an agreement, this letter also refers to the exchange as a thing agreed on,—"with reference to the debentures held by the *Canning Company*, which I agreed to exchange for land, I now beg to propose that such exchange be deferred till their due date." That proposal, as Mr. *Benjamin* says, is an application for an indulgence. The commissioners were pressing for an immediate exchange and that interest should stop, and this is a counter-proposition:—"I know I have agreed to that, but, if you will consent, I wish to have the exchange postponed until the debentures become due." And then comes this proposal of what the company will do, so that the commissioners shall be under no loss, and shall not be liable to the interest in the meantime:—"This will involve the payment of interest by

the municipality to the *Port Canning Company;*"—of course this would be so; for the debentures being still extant, interest would be payable upon them;—"but the latter is prepared to declare now the lots they will receive in exchange for debentures, and to pay a quit-rent thereon equivalent to the interest payable on their debentures. The municipality will thus lose nothing, and the arrangement will be a convenience to the *Canning Company.*" They really say this: If you will, for our convenience, postpone the exchange of the debentures for land till the debentures become due, you shall be no loser; we shall not receive the interest, for we agree to pay you a rent which will be equivalent to it, and therefore one will extinguish the other. That is a distinct proposition. The fair meaning and substance of the whole letter is, we have agreed to take lots to the full amount of the debentures; and if you will consent to the exchange being postponed until the debentures become due, we will not call upon you for the payment of interest in the meantime, and we are now willing to make the selection. But the selection lay with the company; it might be for their interest to make it then, or it might be more for their interest to make it at a future time. The answer comes on the 14th of March, 1867, from the commissioners:—"Dear Sirs, with reference to the letter from Mr. *Schiller*, dated the 20th of December, 1866, copy of which is on the other side, I am instructed by the chairman of the municipal commissioners of *Canning* to state that they agree to the proposal contained in that letter." That proposal I have already interpreted, and there is a distinct acceptance of it. Then they add, "and to request that you will at once declare the lots which your company will receive in commutation of the debentures taken by your company, so that the commissioners may know exactly the lots which they are "bound to hold for the company." The agreement was perfect,—that there should be an exchange; that the time of exchange should be postponed till the debentures became due, no interest being payable in the meantime, and the company being at liberty to select the lots they desired to take. Their Lordships think that the latter part of the letter as to the selection of the lots is not a part of the contract requiring further affirmance to bring the parties to a complete agreement, but relates to the execution of that which they had agreed upon.

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The two following letters, which it was Mr. *Cowie's* object to make a part of the agreement (his contention being that it was not perfected by the previous ones), appear to their Lordships to be only an attempt to carry it into execution. There is a selection of lots on the part of the *Port Canning Company*, and an intimation from the municipal commissioners that the company had made a selection which was not in accordance with the contract. The letters are the letter of the 2nd of April, and the answer of the 22nd of August. They really amount to this:—The letter of the *Land Company*, professing to carry out the agreement, says:—"We have selected these lots, which are the lots we are willing to take in pursuance of the agreement of exchange for the debentures, and which we think are about the amount of the debentures." The commissioners' answer is, "Well, we have no objection to your having those lots, but we are bound to tell you that you cannot have them for the debentures you now hold, because their value is half a lac more than the amount of those debentures, but we have no objection, if you will return debentures and pay quit rent upon the value of the additional lots, that they shall go to you." That proposal has never been accepted; but the non-acceptance of that proposal, and its being left in an imperfect state, both parties being at liberty to refuse, the one to take, and the other to give in exchange the further quantity of land, cannot affect the previous agreement to exchange the debentures then held by the company for lots equivalent in value to their full amount. That agreement was already made, and in their Lordships' view all that remained to be settled was the execution of it by the selection of the lots in accordance with the contract. The case is in this view extremely simple. It is an agreement to exchange, where on the one side the thing to be exchanged is already defined and specified, and where that which is to be taken in exchange is to some extent indefinite and requires a further act to ascertain it. Suppose *A.* and *B.* had agreed to make an exchange of this sort; *A.* agrees to give *B.* six cows, specific cows, in exchange for six horses which he is at liberty to select out of the stock then upon *B.'s* farm, the selection to be made at a future time; that is a perfect agreement for the exchange, and all that remains is that *A.* should select the horses on *B.'s* farm. There might be a dispute whether

the horses that were upon the farm at the time of the agreement had not been removed, and others substituted; they might differ as to the horses which were intended to be taken in exchange; but that would not affect the agreement, but would be a question of the mode of performance of it.'

A question was raised, whether the letters did not form an agreement which should have been registered under the *Indian Registration Act;* but their Lordships think that the High Court was perfectly right in holding that the letters did not require registration. They do not amount to a lease or an agreement for a lease, but are evidence of a contract of a special character, not coming within any of the definitions found in the *Registration Act.*

On the whole, therefore, their Lordships think that the judgment of the High Court, which reversed the judgment of Mr. Justice *Phear*, is correct; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, with costs.

Solicitors for the Appellants: *J. S. & A. P. Judge.*
Solicitors for the Respondent: *Clarke, Son, & Rawlins.*

J. C.* GAUDET . . . . . APPELLANT;
1872 AND
Dec. 6, 7, 10. BROWN . . . . . RESPONDENT.

1873 BROWN . . . . . APPELLANT;
Feb. 18; AND
May 2, 3, 30. GAUDET . . . . . RESPONDENT.

GEIPEL AND OTHERS . . . . . APPELLANTS;
AND
CORNFORTH AND ANOTHER . . . . . RESPONDENTS.

CARGO EX "ARGOS."
THE "HEWSONS."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND (1).

Admiralty Jurisdiction of County Courts—The County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *Vict. c.* 51), *s.* 2—*Ship and Shipping—Charterparty—Bill of Lading—Freight, when earned—Duty of Master or Shipowner, where he is unable to land a Cargo.*

1. By 32 & 33 Vict. c. 51, s. 2, it is enacted that "Any County Court appointed, or to be appointed, to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship . . . provided the amount claimed does not exceed £300":—

Held, that this section gives the County Court jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases.

2. Plaintiff's ship with a general cargo sailed from *London* for *Havre* with some petroleum on board. Under the bill of lading the Plaintiff was to deliver the petroleum at *Havre*, and it was to be taken out by the Defendant within twenty-four hours after arriving at *Havre*, or ten guineas a day was to be paid for demurrage. On the ship's arriving at *Havre*, the authorities

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

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of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay there. Returning to *Havre*, he discharged his general cargo, and no bill of lading having been presented to him, and no application having been made to him for the delivery of the petroleum, he brought it back to *London*. On the shipowner claiming freight, back-freight, demurrage, and expenses, it was

Held, that he was entitled to freight, back-freight, and expenses. Freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant. And although the petroleum could not be landed at *Havre*, it was in the port a reasonable time, during which the owner might have received it; and the freight was accordingly earned.

In a case where no application for delivery is made, the captain may land and warehouse the cargo at the expense of the merchant; and where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but in the absence of advices he may take it to such a place as in his judgment is most convenient for the merchant, and may charge to the merchant all expenses properly incurred; consequently, here the shipowner was entitled to back-freight and expenses. The demurrage and the expenses incurred in the ineffectual attempt to land at the neighbouring ports were not allowed, but were looked on as part of the expenses of the voyage.

Simpson v. *Blues* (1) disapproved of.

THE case of *Cargo ex Argos* involved two questions; first, as to the Admiralty jurisdiction of County Courts; and, secondly, as to claims by a shipowner for freight, &c., where he had been unable to deliver the goods.

The Plaintiff, *Jules Gaudet*, who traded under the name of *Gaudet Frères*, was, in the month of November, 1870, the owner of the British steamer *Argos*, and of other steamers which were frequent traders between *London* and *Havre*, and other ports in the north of *France*.

The Defendant, *Walter Horner Brown*, was a merchant in *London*, dealing in petroleum, oils, chemicals, and other articles, trading under the name of *Walter H. Brown & Co.*; and on the 25th of November he received an order from Messrs. *Tuffieré & Prudhon*, of *Rouen*, for 200 barrels of petroleum, to be delivered free on board, in *London*, and to be sent to *Havre* as soon as possible.

In consequence of this the Defendant, on the same day, sent his clerk to the Plaintiff's *London* brokers (Messrs. *Rowell & Racine*), to inquire the freight of petroleum from *London* to *Havre*, and the

(1) Law Rep. 7 C. P. 290.

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probable date of sailing of the next steamer, and was informed that the freight would be 15*s.* to 20*s.* per ton, and that the steamer would sail about the end of the week. The Defendant thereupon arranged to send 147 barrels of petroleum by the steamer, and the same was shipped on board the *Argos* on the 5th of December, 1870, and the captain gave the Defendant the following bill of lading:—

"Shipped in good order, and well conditioned, by *W. Horner*, in and upon the good steamship called the *Argos*, whereof is master for the present voyage, *Richardson*, and now riding at anchor in the river, and bound for *Havre*, 147 barrels of petroleum.

	Cwts.	qrs.	lbs.
"The goods to be taken out within twenty-four hours after arrival, or pay £10 10*s.* a day demurrage	421	0	9

Being marked and numbered as in the margin, and are to be delivered in the like good order, and well-conditioned, at the aforesaid port of *Havre*, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, machinery, boilers, steam and steam navigation, of whatever nature or kind soever, excepted, unto order or to their assigns, on paying freight for the said goods at the rate of 20*s.* and 15 per cent. primage per ton gross, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to two bills of lading all of this tenor and date, the one of which bills being accomplished the others to stand void.

"Dated in *London*, 30th November, 1870.

"Weight and contents unknown. Not accountable for leakage.

"*W. J. Richardson.*"

And in the margin was:—

"*Washington*,
1/147.

	£	*s.*	*d.*
"Freight	21	1	3
"Primage	3	3	2
	£24	4	5

"Exchange f. 25·40.

"All goods are subject to a landing charge of 5 per cent. on the amount of freight and primage payable *au change de* f. 25·40."

The bill of lading was by direction of the Defendant made out in the name of *W. Horner*, his first two names.

On the 6th of December, 1870, the Defendant applied to the Plaintiff's brokers for the name of the ship's broker at *Havre*, and was informed it was M. *Genestal, Rue d'Orleans, Havre.* Defendant thereupon wrote him the following letter, which was duly received by *Genestal*, but of which the Plaintiff had no notice:—

"Monsieur *H. Genestal*,
"73, *Rue d'Orleans*,
"*Havre.*

"11, *Billiter Square*,
"6th December, 1870.

"We beg to inform you that we have shipped upon the steamship *Argos*,

Washington,
1/147

147 barrels of spirit of petroleum,
21,392 kilogrammes,

to order. These spirits are to be sent to Messrs. *Tuffieré & Prudhon*, at *Rouen*, and you must not deliver them to any person, unless they present the regular bill of lading indorsed by us.

"The freight and other expenses are to be charged on the goods.

"Accept, Monsieur, our salutations.

"*W. H. Brown & Co.*"

The *Argos* sailed with the petroleum and other goods, being a general cargo, at midnight on the 6th of December, 1870, and arrived at *Havre* on the 7th of December, 1870, at 10.30 P.M., with the red flag flying on account of the petroleum being on board.

At this time there were large quantities of munitions of war in *Havre*, and it was not permissible to bring petroleum there. Accordingly, early on the 8th of December, the authorities of the port compelled the captain to take the ship out of the harbour; and at 10.30 A.M. he started for *Honfleur*, where he arrived at 11.30 A.M. There he was ordered by the harbour master to go away immediately: thereupon he left at 12 noon for the nearest

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port, *Trouville*, where he arrived at 1.30 P.M. Here he was permitted, under the authority of the engineer of the port, to take the ship into dock for the purpose of unloading. However, on the 10th the authorities of *Trouville* compelled him to leave the port, notwithstanding the authority of the engineer. Before leaving, the captain went to *Honfleur*, and lodged with the British consul there a protest, in which he declared that all damages for delay, and all losses and charges incurred by the opposition to his landing the cargo, ought to be borne by the freighters, and that he reserved for himself and his owners all rights against them.

On the 9th of December, M. *Genestal* wrote to the Defendant as follows:—

"*Havre*, the 9th December, 1870.

"Messrs. *Walter H. Brown & Co.*,

"11, *Billiter Square, London.*

"Your letter of the 6th I have received to-day only.

"For some time the entry into the port of *Havre* has been refused to ships carrying petroleum. I have attempted in vain to discharge the 147 barrels at *Honfleur*, and been compelled to send the *Argos* to *Trouville*, where I hope to be able to disembark it. *Rouen* has been occupied by the Germans, and I have not yet heard from Messieurs *Tuffieré & Prudhon*. If a judicial sequestration could be obtained at *Trouville*, he would take care of the goods, and he would only deliver against presentation of a regular indorsed bill of lading, and after payment of the freight, and all other expenses.

"I cannot truly comprehend how the buyers at *Rouen* should have directed this petroleum to go to *Havre*, since it has been forbidden in the newspapers to discharge such goods here, and that for more than two months.

"Accept, gentlemen, my sincere salutations.

"*H. Genestal.*"

The Plaintiff and Defendant were throughout personally quite unaware that there was any difficulty in landing petroleum at *Havre*.

The *Argos* having other cargo in her, Mr. *Duprey*, on the part of *Genestal*, hired a lighter, in order that the petroleum might be

transhipped into her in *Havre* outer harbour or the roads, while the *Argos* went into dock to unload her other cargo.

On the 12th of December, the *Argos* arrived in *Havre Roads*, when the captain found that permission had already been obtained to enter the outer harbour, and having entered the outer harbour, he transhipped the petroleum into the lighter.

Immediately on the arrival of the *Argos* in *Havre* outer harbour the transhipment of the petroleum into the lighter was commenced, and was finished at 4.30 P.M. on the same day, and at midnight the *Argos* entered the dock, and was moored alongside the quay, whilst the remainder of her cargo was discharged, and a fresh cargo shipped for *London;* and on the 16th, a fresh cargo having been loaded, the *Argos* came out of dock, and having (under the orders of the port authorities at *Havre*) re-shipped the petroleum, sailed again for *London*, where she arrived at 9 A.M. on the 18th of December.

During the whole of this time, no bill of lading was presented to the captain or officers of the *Argos*, nor was any request made for the delivery of the goods. In the ordinary course of business petroleum would be delivered on the quay at *Havre*, on presentation of the bill of lading. In this case it would not have been possible for the captain to have landed it on the quay, even if the bill of lading had been presented. M. *Genestal* was well aware of the various movements of the ship, and of the petroleum having been put on board the lighter.

On the 16th of December Messrs. *Rowell & Racine* wrote to Messrs. *W. H. Brown & Co.*, informing them of what had happened, and further saying that the expense incurred would be about £120 or £130. And on the 19th of December they gave notice of the arrival of the *Argos* in *London*, with the petroleum on board. In reply, Messrs. *W. H. Brown & Co.* wrote that Messrs. *Rowell & Racine* were indebted to them in the sum of £240 10*s.* 2*d.*, the cost of the petroleum, inasmuch as they had failed to fulfil their engagement to deliver it at *Havre*.

Thereupon the Plaintiff *Gaudet* instituted a suit *in rem*, under the Admiralty jurisdiction of the City of *London* Court, against the barrels of petroleum, to recover what he claimed to be due.

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The claim amounted to £135 5*s.* 8*d.*, in respect of the following:—

	£	*s.*	*d.*
Outward freight to *Havre* . . .	24	4	5
Freight back to *London*	24	4	5
Expenses paid at *Havre*, *Honfleur*, and *Trouville*, and captain and seamen's travelling expenses	12	9	4
Hire of sloop to put petroleum on board in *Havre* outer harbour, to enable the Respondent's captain to land his other goods on the quay at *Havre* . .	12	7	6
Broker's expenses	5	0	0
Demurrage, five days	52	10	0
Five tons of extra coals consumed . .	4	10	0
Making altogether . . .	£135	5	8

On the 15th of January, 1872, the Judge of the City of *London* Court (Mr. Commissioner *Kerr*) gave judgment for the Plaintiff for the amount claimed.

On the case coming before the Court of Admiralty on appeal, it was contended that the 32 & 33 Vict. c. 51, s. 2 (1), did not give to the County Courts jurisdiction in cases where the Court of Admiralty had no jurisdiction, but only gave a portion of the existing jurisdiction of the Court of Admiralty; and consequently, that the City of *London* Court had no jurisdiction in this case, in which the Court of Admiralty had no original jurisdiction.

On the 16th of July, 1872, the Judge of the Court of Admiralty (Sir *R. J. Phillimore*) delivered his judgment, in which he stated he was of opinion that it was the intention of the Legislature to give to the County Courts a jurisdiction which the Court of Admiralty did not originally possess, and to give an appeal

(1) 32 & 33 Vict. c. 51, s. 2: "Any County Court appointed, or to be appointed, to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—

"1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim *in tort* in respect of goods carried in any ship, provided the amount claimed does not exceed three hundred pounds."

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to that Court. However, he did not feel at liberty to act on this opinion, inasmuch as the Court of Common Pleas had come to an opposite conclusion in *Simpson* v. *Blues* (1). Accordingly he dismissed the appeal with costs; but having regard to the principles laid down by himself in *The Samuel Laing* (2), he granted an appeal to the Judicial Committee of the Privy Council (3).

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THE case of the *Hewsons*, which involved the same question of jurisdiction, was heard at the same time as this case.

There the Appellants, *Geipel* and others, had chartered the British vessel *Hewsons* of the Respondent *Cornforth*, her owner, by the following charterparty:—

"*Hartlepool*, March 14, 1870.

"It is this day mutually agreed between Mr. *Cornforth*, owner of the good ship or vessel called the *Hewsons*, measuring tons, or about eighteen keels, now on her passage to *London*, and Messrs. *Geipel & Co.*, as agents to the freighters of the said ship for successive voyages at and from *Hartlepool* to the *Elbe*; that the said ship shall, with all convenient speed, sail and proceed to a spout as directed by the said *Geipel & Co.*, or their agent, and there take on board a full and complete cargo of coals, to be loaded in six average working days, to commence twenty-four hours after arrival, not exceeding what she can reasonably stow and carry, &c.; and being so loaded, the captain shall immediately call at the office of *Geipel & Co.*, or their agents, and clear with them at the Custom House, also sign bills of lading without qualification as they present them, but without prejudice to this charter; and then, as soon as wind and weather permits, proceed to as above, and there deliver the same to the said freighters or assigns, they paying freight for the same at the rate of £6 15*s.* sterling for keel of 21½ tons taken on board, one pound gratuity being in full of

(1) Law Rep. 7 C. P. 290.
(2) Law Rep. 3 A. & E. 284.
(3) *Cargo ex Argos*, Law Rep. 3 A. & E. 568.

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all pilotage and port charges during the said voyage, the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever during the said voyage always excepted. The freight to be paid, on right and true delivery of cargo, in cash."

A memorandum in the margin of the charterparty contained the words *inter alia:* "This charter to be in force until the 31st of October."

The *Hewsons* performed four voyages under the provisions contained in the charterparty. The fourth voyage was completed by her arrival in *Hartlepool,* on the 3rd of August, 1870. During the time that the *Hewsons* was prosecuting the fourth voyage, war broke out between *France* and *Germany,* and the buoys and beacons for the safe navigation of the river *Elbe* were removed, and from the beginning of August until the 22nd of September the *Elbe* was blockaded by the French fleet.

After the *Hewsons* had completed her fourth voyage, the Plaintiffs never directed or requested the Defendants to send the *Hewsons* to any spout, or to load another cargo, before the 31st of October, when the charter expired by effluxion of time. It was admitted that the ship could not proceed to the River *Elbe* during the blockade, and there was no certainty as to the time when the blockade would cease.

Evidence was given by the Defendant *Cornforth,* that after the *Hewsons* returned from her fourth voyage from the *Elbe,* and while she was in *Hartlepool, William Geipel,* one of the Plaintiffs, informed him that he could not load the *Hewsons* for the *Elbe,* and that on that and on a subsequent occasion he offered to charter her for the *Baltic.* However *William Geipel* denied having ever seen or had any communication with the Defendants between the 11th of July and the month of December.

On the 9th of August the *Hewsons* sailed from *Hartlepool* with a cargo of coals for *Rotterdam,* loaded by other merchants. On the 7th of September she returned to *Hartlepool.* Later in September she again sailed from *Hartlepool* upon a voyage to *Elsinore,* under a charter entered into by her owners while the blockade of the *Elbe* was still in force.

She returned from *Elsinore* on the 10th of December. Steamships commenced to run from *Hartlepool* to the *Elbe* on the 22nd of September, 1870, from which time there was no effective blockade of that river. In October the Plaintiffs tried to charter sailing ships to proceed to the *Elbe*, and on the 29th of October they chartered another ship at the rate of £11 10*s*. per keel; but they were unable to obtain any sailing-ships to proceed thither before that date.

The freight so paid by the Plaintiffs exceeded what they would have had to pay for the *Hewsons* by £85 10*s*. They accordingly commenced a suit in the *Hartlepool* County Court to recover this sum, and also further compensation for the refusal of the Defendants to carry out the charterparty. The Judge of the County Court held that the Plaintiffs had impliedly consented to the contract being suspended until the 22nd of September, but decreed that they were entitled to the sum of £85 10*s*. The Defendants appealed to the Court of Admiralty against this decision, and as in the case of *Cargo ex Argos*, the Judge of the Court of Admiralty held that there was no jurisdiction in the County Court to try such a cause. The Plaintiffs now appealed against this judgment.

Mr. *Milward*, Q.C., and Mr. *Gainsford Bruce*, for the Appellant (*Gaudet*), in the *Cargo ex Argos*, and

Mr. *Cohen*, and Mr. *Walter Phillimore*, for the Appellants (*Geipel* and Others), in the case of the *Hewsons*:—

In *Simpson* v. *Blues* (1) the Court of Common Pleas took an erroneous view of the jurisdiction conferred on County Courts by the 2nd section of the Act of 1869 (32 & 33 Vict. c. 51). It was not the intention of the Judicature to restrict the jurisdiction to cases in which the Court of Admiralty already had jurisdiction. Thus, although the Court of Admiralty has no original jurisdiction in this case, the case can be tried before the County Courts, and brought on appeal before the Court of Admiralty. The words of the 2nd section of the Act express this in unambiguous terms, and they are not limited in any way. That a new and enlarged

(1) Law Rep. 7 C. P. 290.

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jurisdiction was to be conferred by the Act is also indicated by the fact that "Admiralty causes" are alone alluded to in the Act of 1868 (31 & 32 Vict. c. 71), but in the Act of 1869 "Maritime causes" are spoken of as well as "Admiralty causes." The power to appoint "mercantile assessors," which is given by the latter Act, indicates an intention to confer an enlarged mercantile jurisdiction.

The *Admiralty Advocate* (Dr. *Deane*, Q.C.), and Mr. *Murphy*, for the Respondent (*Brown*), in the case of the *Cargo ex Argos*, and Mr. *Clarkson*, and Mr. *E. G. Gibson*, for the Respondents (*Cornforth* and another), in the case of the *Hewsons*:—

Although the words of the 2nd section of the Act of 1869 (32 & 33 Vict. c. 51) are very comprehensive, yet their meaning ought to be restricted by the whole tenor of the two Acts conferring jurisdiction on the County Courts, namely, the Act of 1869 and that of 1868 (31 & 32 Vict. c. 71), of which the Act of 1869 is the supplement. The intention of these Acts was to confer on the County Courts jurisdiction only in Admiralty cases, where the Court of Admiralty previously had jurisdiction. It was not the intention of the Legislature to confer a new mercantile jurisdiction under the guise of maritime jurisdiction. If it were, there would be the anomaly of the Court of Admiralty having appellate jurisdiction in cases where it has no original jurisdiction; and there would be a risk of conflicting decisions being given by the Courts of Law and the Court of Admiralty; questions being determined by the former where the value is above £300, and ultimately by the latter where the value is below £300.

With regard to "Maritime causes" being different from "Admiralty causes," if that be so, there is no appeal to the Court of Admiralty; for the 26th section of the Act of 1868, which gives the appeal, gives it only in Admiralty causes.

In the course of the arguments reference was made to the following cases:—*Sussex Peerage Case* (1); *The St. Cloud* (2); *The Dowse* (3); *Everard* v. *Kendall* (4); *Smith* v. *Brown* (5); *Claydon*

(1) 11 Cl. & F. 143.
(2) Bro. & Lush. 4.
(3) Law Rep. 3 A. & E. 135.
(4) Law Rep. 5 C. P. 428.
(5) Law Rep. 6 Q. B. 729.

v. *Green* (1); *The Danzig* (2); *The Kasan* (3); *The Princess Royal* (4); *The Tigress* (5); *Schuster* v. *M'Kellar* (6); *The Norway* (7); *The Clara Killam* (8).

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Mr. *Gainsford Bruce*, in reply.

1873. Feb. 18. Judgment was reserved by their Lordships, and was now delivered by

SIR MONTAGUE E. SMITH:—

These are appeals from the Judge of the High Court of Admiralty in two cases brought before him on appeal from the City of *London* Court and the County Court of *Durham*, in which, contrary to his own opinion, and in deference to the decision of the Court of Common Pleas, in the case of *Simpson* v. *Blues* (9), he reversed the judgments given by the Courts of First Instance in favour of the Plaintiffs, on the ground that these Courts had no jurisdiction to entertain the suits; granting at the same time leave to appeal to Her Majesty in Council.

The two appeals involve substantially the same question upon the construction of the *County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 Vict. c. 51), and were argued together.

In the first case (*Cargo ex Argos*) the Plaintiff instituted a suit for freight, demurrage and expenses in the City of *London* Court by proceeding *in rem* against the goods, viz. 147 barrels of petroleum, which had been shipped by the Defendant in *London* on board the Plaintiff's ship, the *Argos*, under a bill of lading, making them deliverable at *Havre*, to order or assigns. It was alleged that the French authorities at *Havre* having refused to allow the petroleum to be discharged at that port, the *Argos* endeavoured to land it at *Honfleur* and *Trouville*, but not being permitted to do so, took it back to *London;* the claim was for freight, back-freight, demurrage, and expenses. Various defences were made, but it is sufficient, having regard to the advice which their Lordships propose to tender to Her Majesty, to indicate the nature of the suit, without entering

(1) Law Rep. 3 C. P. 511.
(2) Bro. & Lush. 102.
(3) Ibid. 1.
(4) Law Rep. 3 A. & E. 27.
(5) Bro. & Lush. 38.
(6) 7 E. & B. 704.
(7) Bro. & Lush. 226.
(8) Law Rep. 3 A. & E. 161.
(9) Law Rep. 7 C. P. 290.

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further upon the facts. The suit was heard upon the merits in the City of *London* Court, and also on appeal in the Court of Admiralty, without any objection on the ground of want of jurisdiction; but, pending the consideration of the judgment on appeal, the case of *Simpson* v. *Blues* (1) was decided. The learned Judge then directed the question of jurisdiction to be argued before him; and ultimately, in deference to the opinion of the Court of Common Pleas, whilst declaring his own opinion to be otherwise, reversed the judgment, without giving any decision upon the merits.

In the other case, *The Hewsons*, the parties were reversed. The suit was instituted by the Plaintiff, the charterer, against the owner of the ship by proceeding *in rem*, for a breach of the charter. The Plaintiff had chartered the ship for successive voyages from *Hartlepool* to the *Elbe* during a definite period. It was complained that, after the ship had performed four voyages, her owners refused to complete the charter by making others pursuant to its terms. In this case an objection to the jurisdiction was made in the County Court, but overruled, and judgment given for the Plaintiff upon the merits against one of the Defendants.

The question turns upon the proper construction of the *County Court Admiralty Jurisdiction Amendment Act*, 1869, by which jurisdiction is given to County Courts (appointed to have Admiralty jurisdiction) to try and determine causes (amongst others) "as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship," provided the amount claimed does not exceed £300.

The broad contention on the part of the Respondents is, that this statute has given to the County Courts no more than a portion or branch of the existing jurisdiction which the Court of Admiralty then possessed; and if this be the scope and true meaning of the statute, the objection made to the competency of the County Courts to entertain these suits must prevail, because it is plain that the Court of Admiralty itself had not, in virtue of any authority derived either from the Crown or from Parliament, any original jurisdiction over such suits. This last proposition was not controverted on the part of the Appellants; but it was contended that the Act of 1869 has intentionally given a new and enlarged juris-

(1) Law Rep. 7 C. P. 290.

diction to the County Courts appointed to have Admiralty jurisdiction, over subjects of claim beyond those cognisable by the Court of Admiralty.

It was not, on behalf of the Respondents, denied that the language of the statute is large enough to include the present claims; but the contention at the bar was, that it may be collected from the Act itself, when read with the first statute conferring on the County Court Admiralty jurisdiction, that the Legislature intended no more by the second Act than to give the County Courts a further part of the existing jurisdiction belonging to the Court of Admiralty, which had been omitted from the first Act; and that the wide language of the enactment must be so construed as to limit its operation to this object. The question is thus raised, whether, by the legitimate application of recognised rules of interpretation, this intention can be collected from the statutes with such distinctness as to justify a construction so greatly at variance with the ordinary and natural meaning of the words employed by the Legislature.

The *County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 Vict. c. 71), for the first time gave any Admiralty jurisdiction to the County Courts. That Act empowered the Queen in Council to appoint any County Court to have Admiralty jurisdiction, and to assign districts to such Courts within which it might be exercised. It then enacts that any County Court having Admiralty jurisdiction shall have jurisdiction to try and determine certain causes, which in the Act are referred to as "Admiralty causes," and among them, in the words of the statute, "as to any claim for damage to cargo, or damage by collision . . . in which the amount claimed does not exceed £300."

The 6th section of the Act authorizes the Court of Admiralty to transfer any Admiralty cause pending in a County Court to itself, and the 8th section enables the County Court Judge so to transfer causes.

By the 26th section an appeal from the judgments of the County Courts in Admiralty causes is given to the High Court of Admiralty.

A further provision is made by the 7th section directing the Judge of the County Court, in case, during the progress of an

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Admiralty cause, it should appear that the subject-matter exceeded the limit of amount, to transfer the cause to the Court of Admiralty, which is empowered either to retain or remit it to the County Court.

It appears to be agreed that this Act gave to the County Court no more than a portion, limited as to subject-matter and amount, of the jurisdiction then actually possessed by the High Court of Admiralty. The provisions above referred to are all consistent with what appears to be the scheme of the Act, namely, to confer on selected County Courts certain portions of the jurisdiction then belonging to the High Court of Admiralty to be exercised by them subordinately to the High Court.

The original jurisdiction of the Court of Admiralty (using that term to distinguish it from that given to the Court by modern statutes), as it was understood to stand after the long and memorable conflicts with the Courts of Common Law, which virtually closed in the reign of *Charles* II., did not extend to claims arising upon charterparties, bills of lading, or other agreements relating to the use or hire of ships, or the carriage of goods.

Before, however, the passing of the County Court Acts of 1868 and 1869, the Court of Admiralty had by statute, acquired a partial and limited jurisdiction over certain contracts relating to the carriage of goods.

"The *Admiralty Court Act*, 1861," 24 Vict. c. 10, which was passed "to extend the jurisdiction and improve the practice of the High Court of Admiralty," enacts (sect. 6) that the Court "shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in *England* or *Wales*, in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of, the owner, master, or crew of the ship;" unless it was shewn to the satisfaction of the Court that, at the time of the institution of the suit, any owner or part owner of the ship was domiciled in *England* or *Wales*. The Court of Admiralty thus acquired jurisdiction over some claims arising out of contracts relating to the carriage of goods in ships, but in a very partial and limited manner. The jurisdiction is confined to claims by the owners, &c., of goods, and to cases where the goods are brought into an English port, and

no owner or part owner of the ship is domiciled in *England*. No jurisdiction is given in the converse case of claims by the owner of the ship against the owner of the goods, and no jurisdiction whatever is given in the case of claims arising out of charterparties or other agreements for the use or hire of ships.

This was the state of the jurisdiction of the High Court of Admiralty in relation to claims arising upon contracts for the carriage of goods, when the County Court Acts of 1868 and 1869 were passed.

It has already been shewn that the Act of 1868 gave to County Courts only a partial and limited jurisdiction to try and determine "Admiralty causes," relating to "any claim for damage to cargo." in which the amount did not exceed £300.

Their Lordships now come to the consideration of the Act of 1869. They will, in the first place, examine the enactment itself, which is to be construed. It was enacted (sect. 2) "that any Court appointed to have Admiralty jurisdiction" (these words are descriptive only of the Court) "shall have jurisdiction . . . to try and determine the following causes—as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship."

This enactment, taken by itself, is certainly plain and intelligible, and the language is free from ambiguity. The described Courts are to have jurisdiction to try and determine causes relating to certain claims. The first head of claims is "any claim arising out of any agreement made for the use or hire of any ship." These words plainly and in apt language describe contracts for the use or hire of ships, *e.g.*, charterparties, and not agreements for the mere carriage of goods, which are described and provided for in the next branch of the enactment thus: "or in relation to the carriage of goods in any ship." Now, if the contention is allowed to prevail that no jurisdiction was conferred on the County Courts by this Act beyond that belonging to the Court of Admiralty, the consequence would be that no operation would be given to the first branch of the enactment relating to claims arising out of agreements for the use or hire of any ship, for the Court of Admiralty had no jurisdiction, either originally or by statute, over such claims. There appears to their Lordships to be great difficulty in an interpretation which would nullify this first and important

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branch of the enactment, and practically cut it out of the statute; and if this cannot legitimately be done, it would follow that some new jurisdiction beyond that possessed by the Court of Admiralty was given to the County Courts; and if any were so given, the whole contention of the Respondent, which rests on the hypothesis that no such new jurisdiction was conferred, necessarily fails.

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The words which describe the second head of claim, viz., "any claim arising out of any agreement in relation to the carriage of goods in any ship," are clearly wide enough to comprehend claims, as well on the part of the owners of ships, as the owners of goods; thus again, in terms at least, going far beyond the partial jurisdiction given to the Court of Admiralty by the *Admiralty Court Act*, 1861, in favour only of the owners of goods.

It cannot be denied that it was intended by the Act of 1869 to give to the County Courts some new jurisdiction over claims arising out of agreements between shipowners and merchants beyond that bestowed on them by the Act of 1868, which gave jurisdiction only over "any claim for damage to cargo;" but it was contended for the Respondents that these last words, not being sufficiently large to include all the jurisdiction given to the Court of Admiralty by the *Admiralty Court Act*, 1861, in favour of the owners of cargo, the Act of 1869 was passed merely to supply this deficiency. If this were really meant to be the limited scope of the second Act, it is reasonable to suppose that the language of the *Admiralty Court Act*, 1861, would have been followed, or at all events that some words would have been used to indicate this limited intention. It seems scarcely conceivable, if the only object of the *County Court Act* of 1869 had been to give the County Courts so much of the partial and limited jurisdiction of the *Admiralty Court Act*, 1861, as had not been included within the Act of 1868, and no more, that the wide language actually found in it should have been employed — language which describes with accuracy entirely new heads of claims, namely, those arising from agreements relating to the use and hire of ships, and claims by shipowners in relation to the carriage of goods, which had no place in the *Admiralty Court Act*, 1861.

It was contended for the Appellants that, besides these considerations, the context of the statute of 1869 really supported, or was, at the least, consistent with, the presumption of an intention to

give the new jurisdiction, which the language of the enactment, taken by itself, would undoubtedly confer.

Differences in the language and provisions of the Acts of 1868 and 1869 were relied on in support of this contention, which appear to be deserving of consideration.

The causes described in the Act of 1868 are referred to as "Admiralty causes," whereas in the 2nd section of the Act of 1869, which gives the new jurisdiction, the descriptive word is "causes" only. Again, the 5th section of the Act of 1869 empowers the Judge to appoint "mercantile assessors" in any Admiralty or maritime cause. In a technical sense Admiralty causes are, no doubt, maritime causes; but the latter word is introduced for the first time in the second Act, as if to designate causes which could not be strictly referred to as Admiralty causes. The power itself to appoint mercantile assessors, given for the first time, may not unreasonably be regarded as an indication that the Legislature really intended to confer enlarged mercantile jurisdiction upon the County Courts, in which the experience of merchants would be useful to the Judges.

On the other hand, their Lordships have felt the full force of the contention that, having regard to the general tenor and provisions of the two County Court Acts, it ought not to be presumed that the Legislature intended to give to these Courts a large jurisdiction over mercantile causes, not possessed by the Court of Admiralty itself, under the guise of maritime jurisdiction. Very strong grounds certainly exist against making such a presumption, if the construction of the Act depended on an implication from language capable of two meanings. The second *County Court Act* is directed to be read and interpreted with the first, and the first —so far, at least, as it relates to claims arising out of contracts for the carriage of goods—did not confer more, if so much, jurisdiction on the County Courts as the Court of Admiralty possessed under its own Act of 1861. The Act of 1869 is in some respects a supplement to that of 1868, and it might not be unreasonable to suppose that the Legislature only intended to give by the second Act further Admiralty jurisdiction, properly so called.

The new mercantile jurisdiction in question, if conferred, certainly establishes an eccentric system of procedure, calculated in its operation to lead to anomalous and inconvenient results. In

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the first place, it confers on the County Courts, appointed to have Admiralty jurisdiction, power to determine important mercantile causes up to the value of £300, which are not within the jurisdiction of the Court of Admiralty itself, and properly belong to the domain of the Common Law Courts. The appeal is given, not to the Courts which have jurisdiction over such causes when they exceed £300 in value, but to the Court of Admiralty, which has not; and power is conferred on that Court to transfer the causes to itself and determine them, although possessed of no original jurisdiction to try them. One consequence of this legislation must obviously be to increase the risk of conflicting decisions on important questions of mercantile law, inasmuch as the determination of these questions, when the value is above £300, will belong to the Queen's Superior Courts of Law and Equity, and to the Courts of Appeal from them; and when below that amount, to the County Courts and to the special appellate jurisdiction provided by the Act. A further anomaly, which may lead to practical inconvenience, arises from the fact that claimants within the limit of £300 may seize the ship or cargo, as the case may be, by proceeding *in rem*, whilst those above this limit have no such power. This difference in remedy involves much more than a distinction in procedure, and may, among conflicting claimants, lead to inconvenience, if not to undue advantage, to some, and prejudice to others.

It is, however, to be observed that some of these anomalies must still exist, even if the construction of the Act be limited. The County Courts would still have jurisdiction over claims by owners of cargo in certain cases, and over claims of damage caused by collision up to £300, with the power of proceeding *in rem*, and with an appeal to the Court of Admiralty; although, no doubt, the great anomaly of giving Admiralty procedure to the County Courts in causes which the Court of Admiralty itself could not entertain, does not exist in these cases.

Their Lordships, whilst fully appreciating the effect of the anomalies and inconveniences above referred to, and of others which are pointed out with great force in the judgment of the Court of Common Pleas in the case of *Simpson* v. *Blues* (1), still feel the difficulty of limiting by judicial construction the plain and unam-

(1) Law Rep. 7 C. P. 290.

biguous words of the statute, especially when one of the consequences of the limitation must be to leave without operation the important branch of the enactment relating to agreements for the use and hire of ships. Even in cases where words are ambiguous and capable of two constructions, the rule is to adopt that which would give some effect to the words rather than that which would give none.

The rule declared by the Judges in delivering their opinion to the House of Lords in the *Sussex Peerage Case* (1) appears to be applicable to the present statute. It is as follows: "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver." The words of the present statute are precise and unambiguous, and, in spite of the anomalies pointed out, it would be difficult to say that, when construed in their natural and ordinary sense, they lead (to use the words of *Parke*, B. (2)) "to manifest absurdity," and must therefore be qualified.

The Legislature, having regard to the convenience of speedy remedy and decision when witnesses were on the spot and available, may have considered that the County Courts, which in maritime districts were appointed to have Admiralty jurisdiction, and which under the first statute possessed a partial jurisdiction over mercantile agreements relating to cargo, might be entrusted to determine, with the aid of mercantile assessors, other mercantile and maritime causes relating to charterparties, bills of lading, and similar agreements up to the value of £300; and they may further have thought that, as these County Courts were invested with Admiralty procedure, the new causes should be dealt with as Admiralty causes, and the appeal should go to the Court of Admiralty. If such really was the intention of the Legislature, however it may be regretted by those who value the symmetry of legal procedure, it has certainly used apt, precise, and unambiguous words to define the new causes it meant to add; and their Lordships find them-

(1) 11 Cl. & F. 143. (2) 2 M. & W. 195.

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selves unable to affirm that the Legislature did not mean what it has plainly said.

The cases which were cited, with the exception of *Simpson* v. *Blues* (1), throw little light upon the construction of this peculiar statute. The rule that the generality of the words of a statute may in some cases be restrained by evidence of intention to be collected from other parts of it has been indeed applied to the construction of statutes *in pari materia* with the Act in question: see *The St. Cloud* (2); *The Dowse* (3); *Everard* v. *Kendall* (4); *Smith* v. *Brown* (5). But in all these cases there were subjects to which the words were properly applicable, and which would satisfy them when construed in a limited sense. It should be observed that in *The Dowse* the present learned Judge of the Court of Admiralty distinguished the second *County Court Act* from the first in the same way as he has done in the judgments now under appeal, and that, in the case of *Smith* v. *Brown*, Mr. Justice *Blackburn* doubted as to the correctness of the decision, although the words in that case were much more capable of receiving, properly and without violence, a limited construction than those of the Act now in question.

Their Lordships have felt that the judgment of the Court of Common Pleas in *Simpson* v. *Blues* (1) is entitled to great consideration, from the authority due to the Court and the force with which the reasons for the decision are stated, and they would have been glad to have been able to rest upon it. The Queen's ordinary Courts of Law, which hold the power of prohibition, must in the end decide questions of jurisdiction; and when their opinion has been fully declared, it must and ought to be acquiesced in; but if, when the question has been brought before them on appeal, their Lordships now yielded to the decision of the Court of Common Pleas, they would in effect conclude an important question of jurisdiction in a manner contrary to the opinion of the Judge of the High Court of Admiralty—and, as at present advised, their own—upon the authority of the judgment of one only of the Common Law Courts, pronounced on a summary application, from which there was no appeal. They think, before this conclusion is reached,

(1) Law Rep. 7 C. P. 290.
(2) Bro. & Lush. 4.
(3) Law Rep. 3 A. & E. 135.
(4) Law Rep. 5 C. P. 428.
(5) Law Rep. 6 Q. B. 729.

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an opportunity should be given for further consideration of the statute. They will therefore think it right to advise Her Majesty to remit the causes to the Judge of the Court of Admiralty to be disposed of on the merits. The parties will be enabled, if so advised, to take proceedings which may lead to pleading in prohibition.

It was suggested in the argument that if "maritime causes" in the Act of 1869 meant suits different from Admiralty causes, such suits were not within the appeal clause (sect. 26) of the Act of 1868, which gave an appeal only in "Admiralty causes." The word "maritime" is very vaguely used in the second Act, possibly to indicate causes other than Admiralty causes properly so called, and probably with no reference to the fact that Admiralty causes are technically styled "maritime." However this may be, it certainly seems to have been intended, by the scheme of the Act, to treat these new maritime causes as Admiralty causes, and that the appeal should be to the Court of Admiralty. Indeed, the fact that the appellate jurisdiction would belong to that Court has been strongly relied on to support the limited construction contended for by the Respondents.

It is unfortunate that a statute dealing with important questions of jurisdiction largely affecting commercial disputes should be so framed as to afford ground for doubt and conflicting interpretations, and the Legislature may, perhaps, think it right to remove, by some explicit declaration, the inconvenience thus created.

In the result their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to remit both causes to the High Court of Admiralty. They think the parties should bear their own costs of these appeals.

On the cause of *Cargo ex Argos* being remitted to the Court of Admiralty, the Judge of that Court (Sir *Robert Phillimore*) gave judgment for the Plaintiff (*Gaudet*) for the full amount claimed.

An appeal was brought against this judgment.

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May 2, 3.

The Admiralty Advocate (Dr. *Deane*, Q.C.), and Mr. *Murphy*, for the Appellant (*Brown*):—

The contract was, in effect, that the shipowner was to deliver

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and land the petroleum at the usual place of unloading at *Havre*, *i.e.*, the *Quay of Havre*. Until the petroleum was landed on the quay, no person could present a bill of lading to the captain of the ship and receive or demand the goods. Thus the shipowner was never ready to give delivery of the goods at the agreed place. The obligation on the Appellant to take delivery did not arise until the shipowner was ready to give it. It was by no act or default of the Appellant that the shipowner did not deliver the goods, or that the ship was detained for five days in seeking to deliver goods, which the captain of the ship knew could not be delivered. The Appellant broke no contract, but acted *bonâ fide* and in ignorance of the prohibition against landing petroleum. On the other hand, the shipowner, who traded regularly between *London* and *Havre*, knew, through his agent *Genestal*, the regulations of the port of *Havre*. At any rate the shipowner can claim only for freight and return freight.

Mr. *Milward*, Q.C., and Mr. *Gainsford Bruce*, for the Respondent (*Gaudet*):—

The freight was earned, because the ship carried the goods to *Havre*, and the Respondent was ready to deliver them. It was the duty of the Appellant, or his agent (and *Genestal* was constituted an agent of his), to present the bill of lading, and to take delivery of the goods. The Appellant contracted to take the goods at *Havre*, and is not relieved from his contract by the interference of the authorities there. Moreover, if there had been a contract to land the goods, the inability to land them arose from the goods being incapable of being landed, and not from any default of the shipowner. The Respondent is also entitled to the back-freight, &c., because the captain of the ship incurred these expenses in doing what he thought was most advisable under the circumstances for the safety and preservation of the goods.

In the course of the arguments reference was made to the following:—*Dakin* v. *Oxley* (1); *Gatliffe* v. *Bourne* (2); *Waugh* v. *Morris* (3); *The Teutonia* (4); *The Fortuna* (5); *Ford* v. *Cotes-*

(1) 15 C. B. (N.S.) 664. 10 Jun 1865 (3) Law Rep. 8 Q. B. 202.
(2) 4 Bing. (N.C.) 329. (4) Law Rep. 4 P. C. 171.
(5) Edwards, 56.

worth (1); *Christy* v. *Row* (2); *Tronson* v. *Dent* (3); *Notara* v. *Henderson* (4); *Australasian Navigation Company* v. *Morse* (5); *Duthie* v. *Hilton* (6); *Brereton* v. *Chapman* (7); *Medeiros* v. *Hill* (8); *Spence* v. *Chodwick* (9); *Paradine* v. *James* (10); *Hadley* v. *Clarke* (11); *Taylor* v. *Caldwell* (12); *Appleby* v. *Myers* (13); *Barker* v. *Hodgson* (14); *Marquis of Bute* v. *Thompson* (15); *Higgins* v. *Senior* (16); *Hill* v. *Idle* (17); *Blight* v. *Page* (18); *Maclachlan* on Shipping, p. 395; *Story* on Agency, §§ 82, 83.

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May 30.

Judgment was reserved by their Lordships, and was now delivered by

SIR MONTAGUE E. SMITH:—

This was a cause originally brought in the City of *London* Court by the Respondent, the owner of the steam-ship *Argos*, for freight, demurrage, and expenses in respect of 147 barrels of petroleum shipped by the Appellant to be carried from *London* to *Havre*.

Judgment was given for the Plaintiff in the City of *London* Court for the full amount claimed, £135 5*s*. 8*d*., and affirmed on appeal by the Judge of the Admiralty Court, with leave to appeal to Her Majesty in Council.

A statement of agreed facts forms part of the record, and the following general facts may be collected from it:—

The *Argos* was one of several ships employed by the Plaintiff to trade between *London*, *Havre*, and other ports in the north of *France*. The Defendant, under the name of *W. Horner* (his trading style being *W. H. Brown & Co.*), shipped the petroleum in the *Argos* under the following bill of lading:—[His Lordship here read the bill of lading, *supra*, p. 136.]

(1) Law Rep. 4 Q. B. 127; Ibid. 5 Q. B. 544.
(2) 1 Taunt. 300.
(3) 8 Moore's P. C. Cases 419.
(4) Law Rep. 7 Q. B. 225.
(5) Law Rep. 4 P. C. 222.
(6) Law Rep. 4 C. P. 138.
(7) 7 Bing. 559.
(8) 8 Bing. 231.
(9) 10 Q. B. 517.
(10) Alleyn, 27.
(11) 8 Durn. & East, 259.
(12) 32 L. J. (Q.B.) 164.
(13) Law Rep. 2 C. P. 651.
(14) 3 M. & S. 267.
(15) 13 M. & W. 487.
(16) 8 M. & W. 834.
(17) 4 Camp. 327.
(18) 3 B. & P. 295, n.

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The *Argos*, with a general cargo, sailed from *London* on the 6th of December, and arrived in the port of *Havre* at 10·30 P.M. on the 7th. On the following morning "the authorities of the port of *Havre*" compelled the master to remove the ship from the harbour in consequence of having petroleum on board, and he then took her to *Honfleur*, and afterwards to *Trouville*, but was compelled by the authorities, for the same reason, to leave those ports. On the 12th the *Argos* returned to *Havre*, anchored in the roads, and obtained permission to enter the outer harbour and discharge the petroleum into a vessel or lighter there; and it may be inferred from the statement that the authorities would have required it to be re-shipped in four or five days. On the same day (the 12th) the discharge took place, and the petroleum remained in the harbour under the master's control until the 16th. On that day the *Argos*, having discharged the rest of her cargo at the quay, was ready to sail on her return voyage.

During this time the bill of lading had not been presented, nor had any request been made by the Defendant or any holder of it for the delivery of the goods. The master, under these circumstances, re-shipped the petroleum, which had been lying in the harbour from the 12th to the 16th, and brought it back to *London*, giving notice to the Defendant of its arrival. It is stated that the port authorities obliged the master to make this re-shipment, which obviously means that they required the petroleum to be taken away from the harbour, either in his own or another ship. It must have been indifferent to them what ship took it away.

On the 16th of December, the day the *Argos* sailed for *London*, the Defendant, without any notice to the Plaintiff, wrote the following letter to M. *Genestal*, the broker of the ship, at *Havre*:—

"Monsieur *H. Genestal*,

"73, *Rue d'Orleans*, "11, *Billiter Square*,
"*Havre*. "6th December, 1870.

"We beg to inform you that we have shipped upon the steamship *Argos*

Washington, 1/147 } 147 barrels of spirit of petroleum.
21,392 kilogrammes,

to order. These spirits are to be sent to Messrs. *Tuffieré &*

Prudhon, at *Rouen*, and you must not deliver them to any person, unless they present the regular bill of lading indorsed by us.

"The freight and other expenses are to be charged on the goods.

"Accept, Monsieur, our salutations.

"*W. H. Brown & Co.*"

This letter did not reach *Havre* until the 9th.

It was contended for the Plaintiff that by this letter the Defendant constituted *Genestal* his agent to deal generally with the goods, and that what was done with them at *Havre* was by his authority as such agent. But, in their Lordships' view, such an agency was not created; in fact, the *Argos* was despatched to *Honfleur* before *Genestal* had received the letter.

The first question is, whether the freight was earned. The bill of lading, which forms the contract, describes the ship as bound "for *Havre*," and the special and material terms are the following, viz.:—"the goods to be taken out within twenty-four hours after arrival, or pay £10 10*s.* a-day demurrage . . . . and are to be delivered in good order, &c., at the aforesaid port of *Havre* . . . . on paying freight."

The master, as a rule, is only bound to deliver cargo upon production of the bill of lading; and it is clear that freight may be earned before actual delivery, if the goods have been brought to the port of arrival ready to be delivered according to the bill of lading. The rule was stated in the judgment of the Court of Common Pleas, delivered by *Willes*, J., in *Dakin* v. *Oxley* (1), as follows:—"The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of *England*, as a rule, freight is earned by the carriage and arrival of the goods, ready to be delivered to the merchant." Arrival, of course, means "at the destined port," as the next passage of the judgment explains.

There is no doubt that, in this case, the goods were carried to the destined port, and the question is, whether, when they had been brought to the port, the master was ready to deliver them

(1) 15 C. B. (N.S.) 664. 10 Jur. N.S. 655

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there, if the merchant had been ready to perform his part of the contract by taking them from the ship.

The express contract of the shipowner is to deliver at the port of *Havre;* that of the merchant to "take out" the goods there within twenty-four hours after arrival, or pay demurrage. No part of the port being expressly mentioned for discharging, there can be no doubt that under usual circumstances the ship ought to have been brought to the place in the port where cargo, such as she carried, is ordinarily discharged. It is stated that "in the ordinary course of business petroleum would be delivered on the quay at *Havre*, on presentation of the bill of lading." Their Lordships, however, think that although this may be the ordinary course, and that in the usual state of things in the port, the quay would have been the proper place for the ship to have gone to be discharged, yet that this being an implied duty only, it does not amount to an engagement to go there in all events and under all circumstances. It may be that, if the shipowner had expressly agreed to go to the quay, he must have been held to a strict performance of what he had contracted to do; but his express contract is only to deliver in the port of *Havre*, and what is a compliance with that obligation must depend on and vary with the existing state of things in the port.

The following observations on this subject occur in the judgment of *Tindal*, C.J., in the case of *Gatliffe* v. *Bourne* (1):—"But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation of such a mode of delivery would accommodate itself to the facts of each particular case; and would let in every species of excuse from the strict and literal compliance with the precise terms of the bill of lading, which must necessarily be allowed to prevail with reference to the means and accommodation for landing goods at different places; the time of the arrival and departure of the vessel; the state of the tide and wind; interruptions from accidental causes; and all the other circumstances which belong to each particular port or place of delivery."

(1) 4 Bing. (N.C.) 329.

The petroleum was not allowed to be discharged at or near the quay, apparently because munitions of war were lying about. But the same impossibility of getting the ship up to it might have arisen, if the quay had been under repair, or the approach to it had been prevented by a wreck. It could not be said that, had such accidents happened, the shipowner would not have performed his contract by being ready to discharge in some other convenient part of the port.

It is true that on the first arrival of the *Argos* at *Havre* she was not permitted to stay anywhere in the port more than a few hours; but on her return, after her ineffectual efforts at other ports, she not only obtained permission to stay in the outer harbour, but to discharge the petroleum there. This outer harbour is within the port, and is, as their Lordships understand, an artificially protected place where goods may be conveniently and safely discharged. The petroleum remained there for at least four days, during which the delivery of it could have been given, being, as their Lordships think, a reasonable time for that purpose; and although the authorities would not allow it to be landed at *Havre*, the Defendant might undoubtedly have received it, if he had chosen, in the harbour, and given it any other destination he pleased.

But it was further contended for the Defendant, that in order to perform his contract, the master must not only have been ready to deliver in the port, but to land the goods at *Havre;* or that, at the least, the Defendant, on receiving them, must himself have been able to land them there; and that as this could not be done, the contract became incapable of performance, and dissolved. Their Lordships are not of this opinion. They think the effect of the stipulation in the bill of lading, "The goods to be taken out within twenty-four hours after arrival, or pay ten guineas a day demurrage," was to cast upon the Defendant the obligation of taking the goods out of, or at all events from, the ship, that is, from alongside. The engagement of the Defendant to pay demurrage after twenty-four hours clearly implies that the parties contemplated that the ship might be detained by his default to take out the goods, and that it was not intended the master should land or take the risk of landing them. The prohibition to land the

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petroleum, therefore, did not prevent the Plaintiff from fulfilling his part of the contract.

The note in the margin of the bill of lading relating to a landing charge is probably a printed form, and may mean that goods, if landed, are subject to such a charge; but this general notice cannot control the special terms in the body of the bill.

In a recent case, *Waugh* v. *Morris* (1), a cargo of hay was brought from *Trouville* to *London*, under charter and bill of lading, which made the hay deliverable at the port of *London*. There was a stipulation to the effect that the cargo should be brought and taken from the ship alongside. The shipper directed the master to proceed to a particular wharf in *Deptford Creek*, and the parties contemplated landing the hay there. It turned out that by an Order in Council, under the *Cattle Diseases Act*, of which they were ignorant, it was made illegal to land in *England* hay brought from *France*. After a long delay the shipper received the hay into another ship alongside; and the action was brought against him for demurrage whilst the ship was detained. The defence set up was the illegality of the contract; but Mr. Justice *Blackburn*, in delivering judgment, made some observations which bear on the objection relied on in this case, that the contract of the shipowner was not performed because the petroleum could not be landed at *Havre*. The learned Judge says: "When it turned out that the Defendants had named a place for the performance of the contract, where the performance was impossible because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance, by receiving the cargo alongside in the river without landing at all, was both legal and practicable." Again, "It is a mistake to say the Plaintiff intended that the hay should be landed. He no doubt contemplated and expected that it would be; for except under very unusual circumstances hay is not brought into the *Thames* for any other object: but all that the shipowner bargained for, and all that he can properly be said to have intended, was that, on the arrival of the ship in *London*, his freight should be paid, and the hay taken out of his ship." The learned Judge also says that the *Teutonia* (2), lately decided by this Committee,

(1) Law Rep. 8 Q. B. 202. (2) Law Rep. 4 P. C. 171.

would have been precisely in point, if the order in force had come into operation after the contract, instead of before.

In *Waugh* v. *Morris* (1) the Plaintiff recovered for the detention of his ship, although it was not possible to land the hay anywhere in the port of *London*. The contract of the shipper in that case does not, in their Lordships' view, substantially differ from the Defendant's in the present.

It was remarked by Mr. Justice *Blackburn* that the hay might, under some circumstances, have been profitably re-shipped, and it might have so happened in this case with the petroleum. It can scarcely be contended that the master would have been justified, when he found the petroleum could not be landed, in at once leaving the port without waiting a reasonable time to give to the Defendant an opportunity of receiving it there. He might, even if the prohibition had not existed, have desired to send the goods to *Rouen* or elsewhere by water, instead of landing them. Their Lordships, therefore, think that the means of performing the contract were not exhausted, nor the contract dissolved, when it was found the ship could not be discharged at the quay and the cargo landed; and that they ought to hold that the master being ready and able to give delivery in the harbour, and having kept the goods a reasonable time there for the purpose, the freight has been earned.

It is admitted that both parties, when they made the contract, were ignorant of the prohibition against landing petroleum, and therefore no question of intentional infraction of the law of *France* arises.

It was contended for the Plaintiff that, as the inability to land arose from the incapacity of the goods, and not of the ship, the judgment of Sir *William Scott* in *The Fortuna* (2) was an authority for declaring the freight to be recoverable, even if the contract of the ship had been to land the goods, or to deliver them on land. But as, in their Lordships' view, that is not the contract, it is unnecessary for them to consider whether the judgment for the Plaintiff could properly rest upon this ground.

The Counsel for the Defendant relied on some of the reasons

(1) Law Rep. 8 Q. B. 202.

(2) Edwards, 56.

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given by the Judges in *Ford* v. *Cotesworth* (1). The action in that case was for detaining the ship, and the Judges were considering whether reasonable diligence had been used by the merchant in unloading the goods. The right to freight did not arise, and the attention of the Judges was directed only to the question whether, under the peculiar circumstances of the case, unreasonable delay in discharging the ship had been established.

The next question to be considered is, whether the Plaintiff is entitled to compensation in the shape of homeward freight for bringing the petroleum back to England. It seems to be a reasonable inference from the facts, that after the four days during which the petroleum had been lying in the harbour had expired, the authorities would not have allowed it to remain there. It was still in the master's possession, and the question is, whether he should have destroyed or saved it. If he was justified in trying to save it, their Lordships think he did the best for the interest of the Defendant in bringing it back to *England*. Whether he was so justified is the question to be considered.

9 Ex 138

As pointed out by the Judge of the Admiralty Court, the same kind of question arose in *Christy* v. *Row* (2). In that case Sir *James Mansfield* says:—"Where a ship is chartered upon one voyage outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision, which I have been able to find, determines what shall be done in case the voyage is defeated: the books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary; I do not know that he is bound to do it; and yet, if it were a cargo of cloth or other valuable merchandize, it would be a great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided."

The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined. (Amongst others, *Tronson* v.

(1) Law Rep. 4 Q. B. 127; Ibid. 5 Q. B. 544. (2) 1 Taunt. 300.

Dent (1); *Notara* v. *Henderson* (2); *Australasian Navigation Company* v. *Morse* (3).) It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing.

Most of the decisions have related to cases where the accident happened before the completion of the voyage; but their Lordships think it ought not to be laid down that all obligation on the part of the master to act for the merchant ceases after a reasonable time for the latter to take delivery of the cargo has expired. It is well established that, if the ship has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principles that the expenses properly incurred may be charged to him.

Their Lordships have no doubt that bringing the goods back to *England* was in fact the best and cheapest way of making them available to the Defendant, and that they were brought back at less charge in the *Argos* than if they had been sent in another ship.

If the goods had been of a nature which ought to have led the master to know that on their arrival they would not have been worth the expenses incurred in bringing them back, a different question would arise. But, in the present case, their value, of which the Defendant has taken the benefit by asking for and obtaining the goods, far exceeded the cost.

The authority of the master being founded on necessity would

(1) 8 Moore, P. C. 419. (2) Law Rep. 7 Q. B. 225.
(3) Law Rep. 4 P. C. 222.

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not have arisen, if he could have obtained instructions from the Defendant or his assignees. But under the circumstances this was not possible. Indeed this point was not relied on at the bar.

Their Lordships, for the above reasons, are of opinion that the Plaintiff has made out a case for compensation for bringing back the goods to *England*.

But they think the Plaintiff is not entitled to recover the amount claimed for demurrage and expenses in attempting to enter the ports of *Honfleur* and *Trouville*. These efforts may have been made by him in the interest of the cargo as well as the ship; but they were made before the ship was ready to deliver at all in the port of *Havre*, and the expenses of this deviation and of the return to *Havre*, after permission had been obtained to discharge there, must be treated as expenses of the voyage, and not as incurred for the benefit of the Defendant.

The charges for the hire of the vessel and of storing the petroleum in her at *Havre*, after permission had been obtained for its discharge there, stand on different ground. If the ship had then waited in the outer harbour with the petroleum on board, the Defendant would have been liable to pay demurrage at £10 10*s*. a day. It was obviously, therefore, to his advantage under the circumstances for the master to hire the vessel, and thus relieve him from the heavy demurrage payable for the detention of the ship. The whole expense of this operation appears to be about £15 only.

In the result their Lordships think the Plaintiff is entitled to recover the outward freight, and the charge made for the carriage back to *England*, together £48 8*s*., and also the £15 for the above expenses at *Havre*, in all £63 8*s*.

When their Lordships remitted the cause, after deciding the question of jurisdiction, they were told it had been fully heard by the Judge of the Admiralty Court, and they presumed that the judgment he was prepared to give would be acquiesced in. The Defendant, however, notwithstanding the small amount in dispute, applied for leave to appeal, which was granted only on the ground that questions of law of general importance were involved in the decision. Having failed on these questions, he ought, although

the decree will be reduced in amount, to pay the costs of his appeal.

Their Lordships will humbly advise Her Majesty that the judgment given for the Plaintiff ought to be affirmed, except only that the amount thereof should be reduced to £63 8*s*. The Respondent will have the costs of this appeal.

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Solicitors for *Jules Gaudet:* Messrs. *Cattarns, Jehu, & Cattarns.*
Solicitors for *Walter Horner Brown:* Messrs. *Heather & Son.*
Solicitors for *Geipel* and others: Messrs. *Dyke & Stokes.*
Solicitors for *Cornforth* and Another: Messrs. *Clarkson, Son, & Greenwell.*

THOMAS FENTON . . . . . APPELLANT;

AND

JAMES BLACKWOOD, CHARLES IBBOTSON, JOHN GOODMAN, AND ROBERT POWER . . . . . RESPONDENTS.

J. C.* 1874 *Jan.* 29.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Mortgage—Discounts on Renewal of Bill—Payments on Account of Live Stock.

A. gave his acceptance to *B.* for £18,700, payable (six months after date) on the 5th of February, 1867, and it was discounted by the *Bank of C.*

A. mortgaged a station and also mortgaged the stock upon it to *B.* to secure the repayment of £18,700, with interest at 12½ per cent., on the day above-mentioned, and to secure the payment of any bill which the mortgagee might receive, take, make, or indorse by way of renewal or in substitution for the acceptance, or on account of all or any part of the sum therein mentioned, or on any other account incidental thereto. It was also stipulated in the mortgage of the stock that if default should be made in payment by the mortgagor of the licence fees, or rent, charges, fines, penalties and other charges which should become payable in respect of the station or run, or the stock thereon, or in relation thereto, the mortgagee might pay it, and the run, stock, &c. should be chargeable therewith.

The bill was renewed from time to time, *B.* paying the discounts to the bank on *A.*'s behalf, and debiting *A.* with the amount in an account current

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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rendered to *A.*, in which he charged *A.* with interest and mercantile commissions :—

Held, that, notwithstanding this mode of keeping the accounts, the amount of the advances for discounts was secured by the mortgage :

Held, also, that advances for payment of government rent due and for scab licences for sheep might be charged to the mortgage, but that sheep-wash could not.

THE questions in this appeal arose upon exceptions to the Master's report made under a decree for an account obtained by the Appellant, the second mortgagee, against the Respondents, the first mortgagees. The Supreme Court of the Colony, on the hearing of the exceptions upon appeal from Mr. Justice *Molesworth*, allowed four of the items excepted to, which were the subject of the appeal to Her Majesty.

Mr. *Frederick Fenton*, a brother of the Appellant, was the owner of a station or run called *Reedy Lake*, and of a large stock of horses, cattle, and sheep. The Respondents, who used the style of *Dalgety, Blackwood, & Co.*, were his mercantile agents, and in that character made advances and received and paid money for him.

On the 2nd of August, 1866, *Frederick Fenton*, in consideration of an advance of £17,765, executed two mortgages to *Dalgety & Co.*, one of the station and the other of the stock, to secure the advance and interest at 12½ per cent.

The principal exception, viz., that to the allowance of interest, arose on the mortgage of the station ; the other three arose on that of the stock.

The station was mortgaged to *Dalgety & Co.*, subject to a proviso for re-conveyance on payment by the mortgagor, on the 5th of February, 1867, of £18,700, this sum including interest to that date. The deed contained a power of sale in default of payment, and trusts for the application of the proceeds in payment of principal and interest at 12½ per cent. It also contained the following provision :—

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"And whereas on the treaty for the said loan it was also agreed that the said sum of £18,700 should be secured to the said mortgagees by a bill of exchange to be dated the 2nd day of August, 1866, and drawn by the said mortgagees by their style or firm of *Dalgety, Blackwood, & Co.* upon and accepted by the said mortgagor

for the sum of £18,700, and payable six months after date; and accordingly the said mortgagor has accepted such bill of exchange and delivered the same to the said mortgagees. Now this indenture further witnesseth, and it is hereby covenanted, agreed, and declared by and between the said parties hereto, that these presents, and the several powers, provisoes, declarations, and agreements herein contained, shall extend and be applicable to secure the payment of any bill or bills of exchange or promissory note or notes, or other negotiable security, which the said mortgagees or the survivor of them, his executors or administrators, their or his assigns, or the said firm of *Dalgety & Co.*, shall or may at any time hereafter receive or take, make or indorse, either by way of renewal of, or in substitution for, or in payment or satisfaction of the said bill of exchange for £18,700, or on account of all or any part of the sum therein mentioned, or on any other account whatsoever incidental thereto or consequent thereon, and so on from time to time until the whole of the said sum of £18,700 and interest thereon shall be actually paid, and that these presents and the specialty hereof shall not merge or prejudice the remedy of the said mortgagees or the survivor of them, his executors or administrators, their or his assigns, or the said firm of *Dalgety & Co.*, to sue the said *Frederick Fenton* and recover judgment against him upon the said bill of exchange or otherwise in respect thereof."

The advance of the £17,765 was made in cash by *Dalgety & Co.*, being, in fact, the proceeds of the discount of a bill for £18,700 at six months, drawn by *Dalgety & Co.* upon *F. Fenton*, in conformity with the mortgage. This bill was discounted by *Dalgety & Co.* with the *London Chartered Bank of Australia*; but the discount was not charged to the mortgagor, nor could it have been charged to him, because, by the terms of the advance, the bill included interest calculated up to the day fixed for the redemption of the mortgage, and if it had been paid at maturity the mortgage debt would have been satisfied and the mortgagor entitled to a re-conveyance. But it was not so paid, and on the 5th of February, 1867, the day it became due, a renewed bill was accepted by *F. Fenton* for £18,700, and given by *Dalgety & Co.* to the bank, who charged a discount of 10 per cent. upon it, which *Dalgety & Co.* paid. On the 8th of August, 1867, a second renewed bill was in

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like manner given to the bank, and a like discount of 10 per cent. paid to them by *Dalgety & Co.* A third renewal on similar terms took place, and another bill was given on the 11th of August, 1867. This bill matured on the 13th of August, 1868, and was then paid by *Dalgety & Co.*

During the currency of this last bill, viz., on the 28th of May, 1868, *F. Fenton* assigned all his estate to trustees for the benefit of his creditors.

In August, 1868, *Dalgety & Co.*, in the exercise of their power of sale, sold the mortgaged property, whereupon the Appellant, as second mortgagee, obtained the decree for an account against them, under which the questions in the appeal arose.

The Master's report allowed a sum of £3,688 15*s.* 2*d.* for interest on the £18,700 from the 5th of August, 1867, at the mortgage rate of £12 10*s.* per cent. On exception being taken to this item of the report, Mr. Justice *Molesworth* sustained the exception; but the Supreme Court overruled it and confirmed the Master's report.

The Master's report also allowed to the Respondents, as secured by their mortgage security, certain sums disbursed by them in respect of rent, scab licences, and sheep-wash; and these items were also excepted to.

The sums disbursed for rent were in respect of payments made to the Government of *Victoria* on the 5th of January, 1867, the 6th of July, 1867, the 6th of January, 1868, and the 7th of July, 1868, for rent of the mortgaged station, part of the mortgaged property, which had become due five or six days before the payments were made. The mortgagor had at these dates failed, and was in fact unable to pay the rent. By the provisions of the statutes in force with reference to land held of the Government of *Victoria*, if such rent had remained unpaid for seven days after it became due, the occupier of the station would have been liable to a penalty of £2 for every day that the rent continued in arrear, to be added to the rent which might be levied by distress, and if it had continued in arrear for one month the property would have become liable to forfeiture.

The scab licences charged for were papers which, under Colonial Acts, it became necessary to obtain in consequence of the sheep upon the station (which sheep were included in the mortgage)

having become infected with disease; and in order to avoid a heavy fine under the provisions of the *Prevention of Diseases* (*Animals*) *Statute*, 1864, these licences were obtained by and at the expense of the Respondents, the mortgagor having failed to obtain them, and being, in fact, unable to pay the necessary charges.

The charges for sheep-wash were in respect of materials supplied in order to be used on the mortgaged property for the purpose of curing the disease which had broken out amongst the sheep.

The mortgage of the stock contained the following covenant:—

"And, further, that the said mortgagor, his executors or administrators, shall and will, during the continuance of this security, well and truly conform to, observe, perform, and comply with all the laws and regulations for the time being in force and operation, within the said colony of *Victoria*, for the management of runs, or the stock and animals for the time being thereon, or in relation thereto respectively, including (amongst others) *The Prevention of Diseases of Animals Statute*, 1864, and particularly so far as such laws and regulations respectively shall or may apply to the said station or run called *Reedy Lake*, and the sheep, cattle, horses, and other live stock depasturing thereon. And also will, from time to time, pay all licence fees or rents, assessments, fines, penalties, and other charges, which shall become payable in respect of the said station or run, or the stock for the time being thereon, or in relation thereto. And will not do or suffer to be done, or omit to do, any act, matter, or thing whereby the said licence of the said station or run may become or be liable to become void or avoidable, or liable to be withdrawn or forfeited, or the said sheep, cattle, horses, and other live stock, chattels, effects, and things, may be or be liable to be levied or distrained upon by any process of law or otherwise. And if default shall be made in payment by the said mortgagor, his executors or administrators, of the licence fee or rent, charges, fines, penalties, and assessments aforesaid, it shall be lawful for (but not obligatory on) the said mortgagees, or the survivor of them, his executors or administrators, their or his assigns, to pay the same, and the said run, sheep, cattle, horses, chattels, and premises expressed to be hereby assigned, as well as those which shall be taken possession of under the power hereinbefore contained, shall be charged and chargeable with, and be a

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security for the repayment to them or him of all such sum or sums of money as they or he shall pay or expend for or in respect of such licence fee, rent, charges, fines, penalties, and assessments, together with interest on the same sum and sums at the rate of £12 10s. per centum per annum, to be computed from the time or respective times of payment thereof. And the said run, sheep, cattle, horses, and premises shall not be redeemable until payment as well of such sum or sums and interest as of the other moneys hereby secured."

The sums paid to the bank by way of discount on each of the three occasions of the renewal of *F. Fenton's* bills were advanced for that purpose by *Dalgety & Co.*, who were his agents, and sold produce for him and made advances, and instead of keeping a separate account of the moneys secured by the mortgage, they included their advances for discount and the advances on account of rent, scab licences, and sheep-wash, in the same account with their other transactions (which account was produced to him), debiting him with interest and mercantile commissions upon them.

Such having been the transactions between the parties, the mortgagees, as already mentioned, exercised their powers of sale, and a second mortgagee having filed his bill for an account, the decision was given from which the present appeal was brought.

Mr. *Fitzjames Stephen*, Q.C., and Mr. *H. H. C. Hardy*, for the Appellant:—

The question is whether the moneys advanced by *Dalgety & Co.*, not to *Fenton*, but to the bank on behalf of *Fenton*, and which they debited to *Fenton* in account, were advanced to *Fenton* simply in account current, on his personal security, or were advanced on the security of the mortgage. We say that the payment of the discounts was payment of interest on the mortgage, and that *Fenton* in effect borrowed this money from *Dalgety & Co.* on his personal security, as he might from any one else, to enable him to pay that interest.

The interest on the mortgage was virtually satisfied by the discounts paid to the bank on the renewed bills which had been debited to *F. Fenton* by *Dalgety & Co.* in their general accounts

with him. Although *Dalgety & Co.* in fact found the money, they ought to be considered, in accordance with their own accounts, as having paid the discounts, not as mortgagees, but as *Fenton's* agents, and the money advanced by them for the purpose ought to be treated as loans to him on his personal security, and the way in which they kept the accounts shews that this was their understanding of the transaction.

They made rests nearly quarterly, and debited *Fenton* with the balance, and then carried on the balance into a new account, so that after a short time the account charged compound interest on all advances made by them; which a mortgagee would not, as such, be entitled to charge. The amount exceeds 12½ per cent. per annum.

Large sums of money were from time to time received by *Dalgety & Co.*, as agents for *Frederick Fenton*, in respect of wool transactions and otherwise, and were from time to time credited to him in the accounts; and although, at the date of the assignment executed by him for the benefit of his creditors, a considerable balance was due from him to *Dalgety & Co.*, upon the general result of the transactions between him and them, the several sums advanced by *Dalgety & Co.* for renewing the said bills, and likewise the interest and commission charged thereon, were, upon the principle of *Clayton's Case* (1), paid and discharged by means of the subsequent receipts to a larger amount, as shewn by the accounts rendered to the said *Frederick Fenton*, and all interest due under the mortgage securities held by the Respondents was thus satisfied up to the 13th of August, 1868.

There is nothing in this case to prevent the operation of the ordinary rule as to the appropriation of payments to the earlier debts. There is no charge on the principal or renewals, only on the interest. *Mosse* v. *Salt* (2) is more in our favour than in favour of the Respondents. The payments for rent, scab licences and sheep-wash are not chargeable under the mortgage, which was made merely to secure the amount of the bill. In ordinary mortgage transactions interest runs from the date of the mortgage. Here it is charged from the due date of the bill. The money was actually advanced, not by the mortgagees, but by the bank. The Respon-

(1) 1 Merivale, 572. (2) 32 Beav. 269.

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dents (setting aside their advances as *Fenton's* agents) paid nothing till the last renewed bill fell due, and cannot claim interest for the period before they were called on to pay. Then they sold the mortgaged property. According to the account they get interest larger than that secured by the deed. Payments by the mortgagee while the mortgagor was in full management of the property, not accompanied by any communication with the mortgagor, can only be considered as made on the personal credit of the mortgagor. The interest charged on the account current cannot be removed from the account furnished and charged against the mortgage.

Mr. *N. Lindley*, Q.C., Mr. *J. D. Wood* (with whom was Mr. *Stirling*) for the Respondents:—

The Respondents have not proved against *Fenton's* estate for anything that they now seek to charge against the mortgage. The payments for discounting were in reality made, not by *Fenton* but by the mortgagees themselves, and therefore fall within the terms of the mortgage. It appears, on examination of the items, that no cash has come to the hands of the Respondents that could be attributed to that mortgage. The cash balances carried on are not balances that came to the hands of the Respondents. The only cash that they received consisted of proceeds of sales. All the moneys which they received on account of the sale of wool were pledged, and *Clayton's Case* (1) does not apply: *Stovelot* v. *Eade* (2). All the charges which form the subject of the third exception fall within the terms of the mortgage deed. Even if commission has been unduly charged in the Respondent's accounts, that does not bar their claim for interest. They could recover upon the accounts when correctly made up. Commission previous to February, 1867, is not now claimed. It is not probable that money would be advanced on mere personal security. Merchants in *Australia* always get wool when they make advances. *Fenton* could not pay the rent, and the provisions of the Statute as to contagious diseases of cattle were stringent. If an action had been brought on the covenant for payment of interest, what plea could have been set up? Interest was not paid, nor any benefit received on account or in satisfaction of the debt. No bill was given for the interest of the debt, nor did the Respondents

(1) 1 Mer. 572. (2) 4 Bing. 154.

ever give up their claim under the mortgage for interest. The new bill did not destroy the old: *Lumley* v. *Musgrave* (1); *Florence* v. *Jenings* (2). Getting judgment for the principal is not a forfeiture of a claim for interest. As to the other payments made by the mortgagees, the mortgagor knew he could not pay rent; he had covenanted to pay the money, and he needed no further notice.

Mr. *Fitzjames Stephen*, Q.C., in reply.

Their Lordships' judgment was delivered by

SIR ROBERT P. COLLIER, who, after stating the facts of the case, proceeded as follows:—

The first question in the appeal is, whether the sum of £3688 15*s.* 2*d.* was rightly allowed for interest on the £18,700 from the 5th of August, 1867, at the mortgage rate of £12 10*s.* per cent.

F. Fenton, in point of fact, paid off no part either of the principal or interest secured by the mortgage, unless, as was contended by the Appellant, the interest was virtually satisfied by the discounts paid to the bank on the renewed bills, which had been debited to *F. Fenton* by *Dalgety & Co.* in their general accounts with him. It was contended that, although *Dalgety & Co.* had in fact found the money, they ought to be considered as having paid the discounts as *Fenton's* agents, and that the money advanced by them for the purpose ought to be treated as loans to him on his personal security. The accounts rendered by *Dalgety & Co.* supported, it was said, this view of the transaction; and undoubtedly *Dalgety & Co.*, who acted as mercantile agents for *F. Fenton* in selling produce and making advances, included these discounts in the same account with their other transactions, debiting him with interest and mercantile commission upon them.

It was properly conceded by the Counsel for the Respondents, that if the discounts had been really paid by *F. Fenton*, such payments would have enured in satisfaction of the interest on the mortgage debt; because payments of the discounts by him would have been a mode of paying interest on the amount of the bill, and the bill was only another security for that debt. But their

(1) 4 Bing. N. C. 9. (2) 2 C. B. (N.S.) 454. 2 Jur. N.S. 774

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Lordships think it cannot possibly be affirmed that payments made by the mortgagees themselves for discounting the bills would so operate.

Nor can the contention in their Lordships' view be sustained, that the discounts should be treated as new loans made by *Dalgety & Co.* to *F. Fenton* on his personal security, so that payment by them of the discounts became equivalent to payment of these charges by him. The accounts referred to no doubt afford some evidence to this effect; but when it is considered that the mortgage deed provides that a bill should be given for the debt, and contemplates renewals of it, and that the mortgage was given for the purpose of securing not only the principal debt represented by the bill, but the interest upon it, it cannot be presumed that *Dalgety & Co.* by rendering these accounts meant to abandon the security of the mortgage, and trust only to the personal credit of their mortgagor for the interest. The accounts appear to have been made out in ordinary course as between merchants, to shew the general state of their dealings, but it ought not to be presumed that this form of statement was intended to alter the substance of the transactions between them, so as to make the debit of the sums paid for discount operate as satisfaction of the interest secured by the mortgage.

If the account containing the charges for discount had been paid by *F. Fenton*, such payment would, no doubt, have been equivalent to his having himself discounted the bills; and, upon this view, it was contended as a further point by the Appellants' Counsel, that there were entries in the accounts of moneys received from *F. Fenton* subsequent to the entries of the discounts, which, according to the principle of *Clayton's Case*, operated as payment of them. But on an examination of the entries referred to during the argument, it appeared that the moneys to which they related ought to be appropriated to other specific advances, and this contention consequently failed upon the facts.

The result is that, in their Lordships' opinion, the Respondents are entitled to the benefit of the mortgage in respect of the interest on the principal debt secured by it, and that the exception to the Master's Report allowing such interest has been rightly overruled by the Supreme Court.

The questions on the other three items excepted to, arise under a covenant in the mortgage of the stock, which provides that certain payments, if made by the mortgagee, shall become a charge on the stock. It is as follows:—[His Lordship here stated the terms of the covenant, *ante*, p. 168.]

First, as to rent. The Master allowed the mortgagees three payments they had made on this account, amounting together to upwards of £1200.

It was not denied that the mortgagees had power by the above clause to pay the rent and add it to their mortgage debt, if the mortgagor failed to pay it. But it was said that there was no evidence that the rent was, in fact, paid by *Dalgety & Co.*, because of the default of the mortgagor; and further that, as in the accounts above referred to, these payments were debited to the mortgagor, with interest and commission thereon, *Dalgety & Co.* must be taken to have paid the rent as agents merely for *Fenton*, and not as mortgagees under the clause above set out.

Their Lordships find little difficulty in coming to the conclusion of fact that *F. Fenton* failed to pay the rent. Thereupon *Dalgety & Co.* had authority, under the mortgage, to do so, and did, in fact, pay it to prevent forfeiture. It would require strong evidence to prove that, having the power to get the benefit of the mortgage security, they, in fact, made the payments, not as mortgagees, but as agents of *Fenton*, on his personal credit only. The accounts in which these payments are debited, with charges for interest and commissions, are relied on for this proof. But it seems to their Lordships it would be giving a greater effect to these accounts than the parties intended if such a conclusion were to be drawn from them. They appear, as already stated, to be made out according to the custom of merchants acting for a principal, to shew the general state of the account; and it ought not to be inferred from them, without other evidence, that *Dalgety & Co.* intended to give up the special securities they might have in respect of any items contained in them. There is no evidence that *Fenton* instructed them to pay the rents as his agents; and, in the absence of such instructions, their Lordships think it cannot be inferred that they made the payments merely as such agents, and elected to abandon their right to resort to their mortgage security in

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respect of them. They are of opinion, therefore, that the Supreme Court was right in overruling the exception to the allowance of the rent.

The two remaining items excepted to, viz., the sums paid for scab licences and for sheep-wash, raise the further question, whether they are payments that the mortgagees had authority to make, upon the mortgagor's default, under the above clause.

With respect to the scab licences. The words "licence fees" in the clause do not, in their Lordships' opinion, include sums paid for such licences, but refer to fees in the nature of rents payable in respect of land or pasturage licences. The other words of the clause which are, it was contended, sufficient to comprehend them are, "charges which shall become payable in respect of the said station or run, or the stock for the time being thereon, or in relation thereto." The construction may admit of some doubt, but their Lordships, on the whole, think that the sums paid for the scab licences are charges payable in respect of the stock within the meaning of these words. The provisions of the Colonial Act, *The Prevention of Diseases of Animals Statute*, 1864, sects. 15 & 16, require owners of infected sheep to obtain licences from the Inspector to keep them, and to pay certain fees upon such licences, and in default a penalty of 2*s.* for each sheep is imposed on such owners; and, by the 25th section, in case the penalty is not paid, two justices may order the sheep to be sold. It appears to their Lordships that these provisions imposed a statutable obligation on the mortgagor to obtain licences for the infected sheep and to discharge the fees payable upon them, and that these sums are, therefore, charges payable in respect of the stock, which the mortgagor was by law bound to pay, and, on his default, the mortgagees were authorized to pay by virtue of the clause. The exception to their allowance has, consequently, been rightly overruled by the Supreme Court.

The exception to the sums paid for sheep-wash must, their Lordships think, be allowed. These payments are clearly not within the terms of the clause in question; and, as the mortgagees had not taken possession at the time they were made, there is no ground on which they can be considered to be a charge on the mortgaged property.

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Their Lordships will humbly advise Her Majesty that the Order of the Supreme Court ought to be varied as to the payments for sheep-wash, and so much of the Order as overruled the exception to them reversed, and such exception allowed; and that, as to the rest of the Order appealed from, that it ought to be affirmed.

The Appellant, although failing in his appeal upon the most important exceptions, has succeeded upon one, involving a substantial amount. Under these circumstances, their Lordships think that each party should pay his own costs of this appeal.

Solicitors for the Appellant: *Wadeson & Malleson.*
Solicitors for the Respondents: *Murray & Hutchins.*

J. C.
1873
May 13, 14, 15;
June 19.

THE ATTORNEY-GENERAL OF OUR LADY THE QUEEN FOR THE COLONY OF HONG KONG . . . . . } APPELLANT;

AND

KWOK-A-SING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG (1).

Hong Kong Ordinance, No. 2 of 1850—*Treaty of the Bogue—Treaty of Tientsin—Extradition of Criminals—Interpretation of the Words "Crimes and Offences against the Laws of China"—Definition of Piracy jure gentium—Habeas Corpus Act, s.* 6.

It is a provision of the *Hong Kong* Ordinance, No. 2 of 1850, that, where it may appear to a magistrate or Court that there is probable cause for believing that a Chinese, who has taken refuge at *Hong Kong*, has committed "any crime or offence against the laws of *China*," he may be imprisoned with a view to his being surrendered to the Government of *China*:—

Held, that the words "crime or offence" must be limited to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of *China*, such as murder, robbery, theft, or arson, committed by a Chinese within Chinese territory, or in Chinese ships on the high seas; piracy, moreover, in certain circumstances would

* *Present*:—SIR J. COLVILE, SIR R. PHILLIMORE, THE LORD JUSTICE MELLISH, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

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come within the Ordinance, as for example if a Chinese went from the Chinese coast to plunder ships at sea, returning again to *China* with his plunder.

Where a Chinese, who had taken refuge in *Hong Kong*, was accused of having previously murdered a French captain of a French ship at sea, it was held that he could not be imprisoned and delivered up to the Chinese Government under the Ordinance; on two grounds—1. That it could not be assumed without evidence, that there was any law in *China* to punish a Chinese subject for a murder committed upon a foreigner within foreign territory; and, 2. That, even if it could be so assumed, still the offence having been committed within French territory, ought to be treated as an offence against French and not as an offence against Chinese law.

Where some of a large number of Chinese coolies, who were being taken from *China* to *Peru* in a French ship, killed the captain and several of the French crew, and then took the ship back to *China*, they were held to have been guilty of piracy *jure gentium*. But the piracy was held not to be an offence against the law of *China* within the meaning of the Ordinance. If they committed an act against the municipal law of any nation, it was against that of *France*; and if they were punishable by the law of *China*, it was only because they had committed an act of piracy, which *jure gentium* is justiciable everywhere.

One of these coolies, who had taken refuge at *Hong Kong*, had been imprisoned with a view to being surrendered to the Chinese Government on the ground of his having feloniously seized the ship at sea and murdered some of the crew, and had been brought up on a writ of *habeas corpus*, and discharged by the Chief Justice of *Hong Kong*. Thereupon he was again arrested on a warrant for piracy *jure gentium*. On being brought up again on a writ of *habeas corpus*, he was again discharged by the Chief Justice, on the ground that he had been committed a second time for the same offence, contrary to the 6th section of the *Habeas Corpus Act*. On appeal it was

Held, by the Judicial Committee, that the first order of discharge should be upheld, but that the second order of discharge should be reversed.

The 6th section of the *Habeas Corpus Act* applies only where the second arrest is substantially for the same cause as the first, so that the return of the second writ of *habeas corpus* raises for the Court the same question with reference to the validity of the grounds of detention as the first.

The Chief Justice having been of opinion that the ship was a slave ship, and that the coolies were justified in killing the captain and crew for the purpose of obtaining their liberty; the Judicial Committee thought the evidence before him did not prove this.

Piracy defined as "robbery within the jurisdiction of the Admiralty."

THIS was an appeal from two orders of the Supreme Court of *Hong Kong*, whereby *Kwok-a-Sing*, a Chinese coolie, was twice released from custody on writs of *habeas corpus*.

On the 30th of September, 1870, a French vessel, called *La Nouvelle Pénélope*, sailed from *Macao*, in *China*, with 310 coolie emigrants, including *Kwok-a-Sing*, bound for *Peru* in *South America*.

These emigrants were shipped in conformity with certain regulations in force at *Macao* in relation to Chinese emigration, and had before embarkation complied with the formalities prescribed by the law of *Macao*, and declared their willingness to emigrate on the conditions contained in certain contracts signed by them. From the "barracoon," where they were kept for a time, they were taken on board the ship in boats guarded by Portuguese soldiers. On board, they were kept below at night, but by day they were allowed to be on deck in the fore part of the ship. Separating them from the crew were strong barriers across the deck, with a cannon at each door of the barrier. From the evidence it appeared that about 100 of the coolies complained of being kidnapped, but *Kwok-a-Sing* was not one of those who so complained. *Kwok-a-Sing* and seven other emigrants were selected by the captain at the commencement of the voyage to act as head men or corporals for the purpose of keeping order among the coolies; and for this they each received a salary in addition to the advance money.

On the 4th of October, 1870, when the vessel was at sea, *Kwok-a-Sing* and several of the other coolies made a sudden attack on the captain and others of the crew, killed them, and threw their bodies overboard; they then took possession of the ship, and compelled the remaining seamen to conduct it back to *China*. They then landed and abandoned the ship. Some of the coolies were arrested in *China* and tried there. But *Kwok-a-Sing*, for whose apprehension a reward was offered, went to *Hong Kong*. There he was arrested and charged before a magistrate as a suspicious character and a person dangerous to the peace and good order of the colony. Whilst he was so under arrest, on the 3rd of February, 1871, a letter was addressed by the Colonial Secretary to the magistrate, stating that an application had been received from Her Majesty's Consul at *Canton*, claiming on behalf of the Chinese authorities the rendition of *Kwok-a-Sing*. Accordingly, at the close of the investigation, he was committed to prison under the following warrant:—

"*Charles May*, Esquire, one of Her Majesty's Justices of the Peace for the said colony, to *H. Manskey*, Constable of Police in the said colony, and to the Superintendent or Keeper of the Gaol of *Victoria* in the said colony.

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"Whereas the above-mentioned Defendant was on this date duly convicted before *Charles May*, Esquire, one of Her Majesty's Justices of Peace for the said colony, for that a communication having been received requiring the rendition of the Defendant, on behalf of the Chinese Government as a subject of *China*, who has committed certain crimes and offences against the laws of *China* by participating in the murder of a portion of the crew of the French ship *Nouvelle Pénélope*, and it appearing to me, upon investigation of the case, that there is cause to believe that the said Defendant is a subject of *China*, and has committed the said crimes against the laws of *China* by feloniously seizing the said ship at sea, and by murdering the captain and certain of the crew of the said ship on the 4th October last past at sea; and, further, that after the commission of the said crime did feloniously seize a boat belonging to the said ship and land at a place called *Pakha*, in Chinese territory, on the 11th October aforesaid, and it was thereupon adjudged that the said Defendant, for the said offence, should be committed to gaol for detention pending the receipt of orders from His Excellency the Lieutenant-Governor as to his further disposal:

"These are therefore to command you, the said constable, to take the said Defendant and safely to convey to the said gaol, and there to deliver him to the said superintendent or keeper, together with this precept; and I do hereby command you the said superintendent or keeper to receive the said Defendant into your custody in the said gaol, and there to imprison him as aforesaid.

"Given under my hand and seal at *Victoria* aforesaid, this 7th day of February, 1871.

"*C. May*, Police Magistrate."

This warrant was issued under the *Hong Kong* Ordinance, No. 2 of 1850, which enacts as follows (1):—

"Whereas, by the treaties between *Great Britain* and *China*, provision is made for the rendition for trial to officers of their own country of such subjects of *China* as have committed crimes or offences against their own Government, and afterwards taken refuge in *Hong Kong*:

"I. Be it therefore enacted and ordained by his Excellency the

(1) *Hertslet's* Treaties, vol. x. p. 50.

Governor of *Hong Kong*, with the advice of the Legislative Council thereof, that if any complaint or information or any communication by any officer of the Chinese Government be made or forwarded to any magistrate or Court (other than the Supreme Court) desiring the arrest of any person being a Chinese subject, and then within the said colony of *Hong Kong*, and alleging that such person has committed, or is charged with having committed, any crime or offence against the laws of *China*, or if it shall appear in the course of any investigation before such magistrate or Court that any person, being a subject of *China*, has committed any such crime or offence, it shall and may be lawful for such magistrate or court to issue a summons or warrant for the appearance or apprehension of such person; or, if such person be already in custody, it shall be lawful to detain such person, and to investigate the alleged crime or offence in the same manner as if such person were charged with a crime or indictable offence committed within the said colony.

"III. And be it further enacted and ordained, That if at the close of the said investigation it shall appear to the said magistrate or Court that such person as aforesaid is a subject of *China*, and that there is probable cause for believing that the said person has committed such crime or offence, it shall and may be lawful for such magistrate or Court to commit such person for safe custody to prison, and to direct the gaoler to detain such person in prison until the said gaoler shall receive some order or orders from the Governor of *Hong Kong* relative to the further detention, discharge, or transmission of such person to the nearest Chinese authorities, or to such other Chinese authorities as to the said Governor shall seem fit; and the said magistrate or Court shall, upon making such committal as aforesaid, transmit to the said Governor of *Hong Kong* the minutes of such investigation, and all documents in his or its possession connected with the charge against such person, in order that such person may be dealt with according to the treaties aforesaid."

Previously to the passing of this ordinance, a treaty, called the *Treaty of the Bogue*, had been entered into with *China*, whereby it was agreed that if lawless natives of *China*, having committed crimes or offences against their own Government, shall flee to

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Hong Kong, a communication shall be made to the proper English officer, that these criminals and offenders may be seized, and on proof or admission of their guilt be delivered up (1).

Treaty of the Bogue, Art. IX. :—"If lawless natives of *China*, having committed crimes or offences against their own Government, shall flee to *Hong Kong*, or to the English ships of war, or English merchant ships, for refuge, they shall, if discovered by the English officers, be handed over at once to the Chinese officers for trial and punishment; or if, before such discovery be made by the English officers, it should be ascertained or suspected by the officers of the Government of *China*, whither such criminals and offenders have fled, a communication shall be made to the proper English officer, in order that the said criminals and offenders may be rigidly searched for, seized, and, on proof or admission of their guilt, delivered up. In like manner, if any soldier or sailor, or any other person, whatever his caste or country, who is a subject of the Crown of *England*, shall, from any cause or on any pretence, desert, fly, or escape into the Chinese territory, such soldier or sailor, or other person, shall be apprehended and confined by the Chinese authorities, and sent to the nearest British Consul or other Government officer. In neither case shall concealment or refuge be afforded."

Subsequently to the treaty and the ordinance, there was a war between *England* and *China*. And in 1858 the *Treaty of Tientsin* was concluded between *England* and *China*. By this treaty the *Treaty of the Bogue* was abrogated, and new provisions were made for the extradition of criminals from *Hong Kong* to *China* (2).

Treaty of Tientsin, Art. XXI. :—"If criminals, subjects of *China*, shall take refuge in *Hong Kong*, or on board the British ships there, they shall, upon due requisition by the Chinese authorities, be searched for, and, on proof of their guilt, be delivered up."

Immediately after the commitment of *Kwok-a-Sing*, a writ of *habeas corpus* to discharge him was granted by Sir *John Smale*, Chief Justice of the Supreme Court of *Hong Kong*. The return to the writ set out the above-mentioned warrant of the magistrate. Objections were raised as to the validity of this return, and were

(1) *Hertslet's* Treaties, vol. vi. p. 265. (2) Ibid. vol. xi. p. 90.

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argued before the Chief Justice. Judgment was delivered by him on the 29th of March, 1871, and *Kwok-a-Sing* was ordered to be released. The Chief Justice's decision was based on several grounds; *inter alia*, he said:—

"It is clearly now intended that on a treaty ceasing to be in force the provisions for rendition under it are to cease. It seems to me that there must always have been the like intendment in English law, and that this construction must be adopted as to the Ordinance No. 2 of 1850, and that its operation ceased when the *Treaty of the Bogue* was first suspended and then absolutely abrogated, and that it required a new ordinance to carry the entirely new arrangement of 1858 (which differed very much in detail from the *Bogue Treaty*) into effect. I think I must here assume that the maxim, *cessante ratione cessat ipsa lex*, Broom's L. M. 160, applies to this ordinance, this law. . . . .

"I must follow the decision in *Re Ternan* (1), especially as the principle appears to have been approved in *America* (see *Re J. C. Bennett* (2)), and say in this case, as was said in that, the crime, if anything, is piracy, and being justiciable here, if there be any crime, there is no ground for giving up the man. It is beyond doubt that political criminals are not to be given up, though within the letter of the treaty, neither is a Chinese subject to be given up, if justiciable here, *e.g.*, for piracy. . . . .

"Right to rendition is confined to crimes committed within the country demanding it. Involved, however, in this point is the fact proved beyond question that the crime 'charged' was an act committed on the high seas, and also on board what is said to be a French ship. This opens another objection to this demand of rendition by *China*. I readily follow the very high English, the highest individual authority in *England*, which lays down broadly that the country demanding the criminal must be the country in which the crime is committed (1 Phil. Inter. Law, p. 413). If this be good law, as I must hold it to be, and if the opinion given in *Allsop's Case* (3), and if the opinion of *Cushing*, Attorney-General, was properly adopted and acted on in the *United States*, in *David's*

(1) 9 Cox C. C. 522; 33 L. J. (M.C.) 201.
(2) 11 L. T. (N.S.) 488.
(3) Forsyth, C. & O. 368.

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Case (1), then *China* cannot have in this case the right to demand rendition, because the crime, murder, for which rendition is said to be claimed, was committed at sea, and not in *China*. Assume what is not (but which ought to be proved: *R.* v. *Björnsen* (2)), that this was a French ship, should a claim for the rendition of this man by *France* be acceded to? The same very high authority would say, 'No; the usual course is to refuse the request of both the applicants' (1 Phil. I. L., p. 414). . . . .

"I hold that the prisoner was beyond question under unlawful coercion, assuming, as I must and do assume, that the law on board the *Nouvelle Pénélope* to be the same as the English here is; and on the authority of *The Felicidade* (3), referred to and commented on in 1 Phil. Int. Law, 333, 334, it is to me clear that, according to English law, a man under unlawful restraint of his personal liberty at sea, as well as on shore, has a right to take life to free himself from such constraint on his personal liberty; and, further, on the authority before cited, to use his master's or captor's property necessary to effect his object, that object being in itself not only a lawful, but a laudable object: this would seem to be the first law of nature, the right of self-preservation, of liberty equally with life, which is fully sustained by text-books and cases. . . . .

"I must say that, however horrible was the scene of contest, and the carnage on board the *Nouvelle Pénélope*, the depositions disclose such acts of enslavement, and of illegal coercion on the part of the captain and his agents, all the testimony being *ex parte* out of the mouths of the coerced or hostile witnesses for the prosecution, as shew that there was no violence or robbery beyond what was absolutely necessary to regain liberty, and that this prisoner, *Kwok-a-Sing*, was guilty of no offence whatever cognizable by English law. If I had to charge a grand jury as judge, I should so lay down the law; and if I were a grand juror myself, I should, upon such an indictment, for either murder, manslaughter, or robbery, find 'no bill' against this man."

The rendition of *Kwok-a-Sing* had been claimed on behalf of the French Government by the French Consul on a charge of

(1) Forsyth, C. & O. 364. (2) 10 Cox C. C. 74.
(3) Den. C. C. R. vol. i. pp. 104–154.

murdering M. *Le Vigoureux*, the captain of the ship; but after the delivery of this judgment, the French Consul abandoned his claim, protesting against the decision.

The Chief Justice having stated that the crime, if anything, was piracy *jure gentium*, and therefore justiciable at *Hong Kong*, the Attorney-General of *Hong Kong* caused *Kwok-a-Sing* to be arrested on the 26th of April, 1871, on the charge of piracy *jure gentium*. He was thereupon committed to prison under the following warrant:—

"At the Police Court, *Victoria*, in the colony of *Hong Kong*. In the cause in which the Queen, at the complaint of *W. M. Deane*, Captain Superintendent of Police, is Complainant, and *Kwok-a-Sing*, of *Ponyii*, stevedore, Defendant.

"*Charles May*, Esquire, one of Her Majesty's Justices of the Peace for the said colony, to *Charles Bond*, Constable of Police, in the said colony, and to the Governor or Keeper of the gaol at *Victoria*, in the said colony.

"Whereas the above-named Defendant was charged before me, on the testimony of credible witnesses, for that the said Defendant on 4th October last past, with a number of other evil-disposed persons unknown, with arms, upon the high seas, within the jurisdiction of the Admiralty of *England*, in and on board a certain ship or vessel called the *Nouvelle Pénélope*, upon the high sea, then being in and upon one *Vigoureux*, the master of the said ship, the officers and seamen of the said ship, in the peace of God and our Lady the Queen, then and there being, piratically and feloniously did make an assault, and the said ship, and the apparel and tackle of the said ship, feloniously and violently did steal, take, and carry away, and immediately before the commission of the said felony the said Defendant and the evil-disposed persons aforesaid did feloniously and wilfully, and of their malice aforethought, kill and murder the said *Vigoureux*, the master, *Manfillut*, the chief officer of the said ship, and *Le Jusant*, *Paul Gigot*, *François Labert*, *Edmund Mongaret*, and *Ishmael Alphonse*, seamen, and a certain *Manilla* seaman, whose name is not known, of the crew of the said ship; and it was thereupon ordered that the said Defendant should be committed to prison, to take his trial for the said offence at the

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next Criminal Sessions of the Supreme Court to be holden at *Victoria*, in the said colony. These are therefore to command you, the said constable, to take the said Defendant, and him safely to convey to the said gaol, and there to deliver him to the said keeper, together with this precept. And I do hereby command you, the said keeper, to receive the said Defendant into your custody in the said gaol, and him there safely to keep until he shall be thence delivered by due course of law.

"Given under my hand and seal this 10th day of May, 1871.

"*C. May*, 1st Police Magistrate."

A second writ of *habeas corpus* was issued, and a return made, setting forth this warrant.

The case was argued before the Chief Justice, and *Kwok-a-Sing* was discharged, on the ground that the second arrest was a violation of sect. 6 of the *Habeas Corpus Act*. In his judgment, the Chief Justice said:—

"Mr. *Francis*, *Kwok-a-Sing's* attorney, deposes that the piratical and felonious acts deposed to against *Kwok-a-Sing* on this second occasion are the same felonious acts and no other as those in respect of which he was on the 7th of February committed. He also deposed that *Kwok-a-Sing* was on the 10th of May committed by Mr. *May*, and the offence charged in that warrant is the same and no other as that for which he was committed on the 7th of February last. No affidavit in contradiction or explanation having been filed, I must take these statements, so far as they are statements of facts and not conclusions of law, as established for the purposes of the present decision. . . . . Now, considering that the *Habeas Corpus Act* was passed, *inter alia*, to prevent oppression by repeated arrests for the same offence, I read the operative words of sect. 6 as applicable to this prisoner, thus: that no person set at large upon any *habeas corpus* shall be again imprisoned or committed 'for the same offence,' by any person other than by the legal process of the 'Court having jurisdiction of the cause.' I am of opinion that the subsequent part of this section which gives a right of action need not be referred to for the purpose now before me. Now, as I have said, I am bound to believe the uncontradicted affidavit, that

the offence mentioned in each of Mr. *May's* commitments is one and the same, and no other; moreover, the bad act which is the meaning of 'offence,' as set out in each column, appears to me to be the same in substance. Now, who or what has authority given to him or it to again imprison or arrest the man set at large? The 'Court having jurisdiction of the cause,' and no other. Can Mr. *May*, or can his Court, be so designated? *Cox* v. *Coleridge*, 1 B. & C. 37, but which I always read in 3 Burns' Jur., by Chetwyn, 1825, a most instructive case, with which I was more familiar some thirty or forty years ago than now, shews that although when sitting to punish under a statute, Mr. *May* sits as a Court; yet that when he sits as a magistrate with a view to committal for trial before this Court, his magistracy is not a Court; his is a 'preliminary inquiry' and not a 'trial.' But concede it to be a 'Court,' has it or can it have 'jurisdiction of the cause'? Now jurisdiction is an authority *jus dicere*, which has been well translated 'to pronounce judgment,' to give a judicial decision, that is, to end and determine the cause; which Mr. *May* certainly has no authority to do. This simple etymological analysis conclusively, to my mind, excludes Mr. *May's* power to commit, as an exception to the general prohibition of a second commitment in the 6th section. . . . ."

Subsequently to this judgment a declaratory Ordinance was passed by the Legislature of *Hong Kong* to remove doubts as to the application of Ordinance No. 2 of 1850 to the *Treaty of Tientsin;* and it was thereby declared that Ordinance No. 2 of 1850 shall be deemed to apply to that treaty.

On the 5th of February, 1873, leave was granted by Her Majesty in Council to bring the present appeal to reverse the two orders of discharge.

The *Attorney-General* (Sir *J. D. Coleridge*), the *Solicitor-General* (Sir *G. Jessel*), and Mr. *C. Bowen*, for the Appellant:—

The Ordinance of 1850 is still in force, and is applicable to the *Treaty of Tientsin.*

[LORD JUSTICE MELLISH:—There is no doubt that in *England* no treaty unconfirmed by Act of Parliament would be sufficient to

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enable a person to be given up. How far that may be so in a Crown colony, I do not know.]

The *Treaty of the Bogue* was not wholly put an end to by the war; for it was revived on the declaration of peace. After a war the general treaties are usually revived, sometimes in express terms, sometimes by some act of recognition. On the revival of the treaty, it was not necessary to re-enact the Ordinance that was applicable to the treaty. On the making of the *Treaty of Tientsin*, although the *Treaty of the Bogue* was abrogated, it was in reality included in the new treaty together with some improvements. Moreover, the Legislature of the colony has now passed a declaratory enactment declaring that the Ordinance of 1850 refers to the *Treaty of Tientsin*.

[LORD JUSTICE MELLISH:—There is no case, that I know of—and it appears to me to involve an important principle—where, even if a declaratory statute is passed after a formal decision of a Court, it has altered that decision. The Court of Appeal has to decide whether the Judge did right at the time he decided the case. The new Ordinance no doubt applies to litigation, which is going on at the time; but the question is, does it apply so as to make erroneous a judgment which has already been given?]

The new Ordinance declares what the law is now, and what it always was; the Chief Justice, therefore, took an erroneous view of the law, and his decision ought to be reversed by the Court of Appeal.

[LORD JUSTICE MELLISH:—I have an impression that a Crown colony has not jurisdiction to make such a law. It was held in *Phillips* v. *Eyre* (1) that it can pass acts for indemnifying people; but I think everybody was of opinion on that occasion that they clearly could not have passed an Act of Attainder; and this is substantially an Act of Attainder on your hypothesis.]

This is a Crown colony, and the Queen can give any powers.

[LORD JUSTICE MELLISH:—She cannot give a power which deprives English subjects of their rights. She cannot give a power, for instance, to make torture lawful in *Hong Kong*.]

We are not prepared to say she cannot, unless you find an Act of the Imperial Legislature cutting short the power.

(1) Law Rep. 4 Q. B. 225; 6 Q. B. 1.

With regard to the charge against *Kwok-a-Sing*, murder committed by a Chinese is an offence against the laws of *China*, wheresoever it is committed, and consequently comes within the Ordinance. Here a Frenchman was murdered by a Chinese on board a French ship at sea; nevertheless it is an offence against the Chinese law. It is not necessary for us to prove this; for the Court will assume that murder is an offence against the laws of all civilized nations, and is therefore an offence against the laws of *China*. All that was required before the magistrate was a *primâ facie* case. If the crimes that come within the Ordinance of 1850 are to be limited at all, they should be limited to all such crimes as would, if committed by a British subject, be justiciable by the Courts of *Hong Kong*.

With regard to the crime being piracy *jure gentium*, that is a crime against the laws of every country; and is, *à fortiori*, a crime against the laws of *China*. Thus, although the charge of piracy might be justiciable at *Hong Kong*, nevertheless he ought to be given up to *China* under the Ordinance and the Treaty. For he clearly was guilty of piracy.

As to the second order of discharge, it was based on *Kwok-a-Sing's* having been arrested for the "same offence." But the offence was in reality wholly different. The facts leading to the arrest were the same; but the same facts may give rise to several different offences.

Mr. *Fitz-James Stephen*, Q.C., and Mr. *A. P. Stone*, for the Respondent:—

It would seem to be a reasonable interpretation of the *Habeas Corpus Act* that when a man has been committed on one set of facts, and the Court has allowed a discharge under the Act, then he should not be imprisoned again on the same set of facts. However, it does not make much difference whether the second order is right or not, for it did not act as an acquittal; *Kwok-a-Sing* is still liable to be tried on the charge.

With regard to the first order, the Chief Justice of *Hong Kong* was of opinion that the Ordinance No. 2 of 1850 was no longer of any effect. It is clear that the *Treaty of the Bogue* was put an end to by the war, and afterwards was expressly abrogated by the

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Treaty of Tientsin. Thereupon the Ordinance, which was passed for the purpose of carrying the treaty into effect, also came to an end. It cannot be contended that the Ordinance would stand independently of the treaty, for when the treaty no longer existed, there was no machinery for the execution of the Ordinance. If it was intended that the Ordinance should refer to the *Treaty of Tientsin*, the Legislature ought to have passed some enactment expressly to that effect.

[LORD JUSTICE MELLISH:—Supposing we had the misfortune to have a war with *France*, and at the end of the war it was said all the treaties, including the Extradition Treaty, should come into force again, I should doubt whether it would require a fresh Act of Parliament.]

It is said that the new Ordinance is declaratory—that it declares that the Ordinance of 1850 always did refer to the *Treaty of Tientsin*. This new Ordinance was passed after the delivery of the Chief Justice's judgment. If the Privy Council are to consider this new Ordinance in their consideration of the appeal, there would be in effect an appeal from the Chief Justice to the Legislature of *Hong Kong*. The new Ordinance is intended to be merely a declaration of the way in which the law shall be read for the future.

The charge against *Kwok-a-Sing* is the murder of a Frenchman by a Chinese on board a French ship at sea. It has not been shewn that this is an offence against Chinese law. A corresponding act by an Englishman would not be an offence against the Common Law; it could only be tried in *England* under a recent statute. But even if the murder be an offence against Chinese law, it does not come within the Ordinance of 1850. There must be some limitation on the words of that Ordinance. Persons charged with political crimes, for instance, could not be given up, although what they had done might be an offence against the law of *China;* nor could persons charged with transgressing the Chinese ceremonial law. The words of the Ordinance must be subject to all reasonable exceptions, such as where the more humane laws of more civilized nations differ from those of *China*. It would be an extraordinary arrangement, if we gave up persons not guilty of offences under the

English Law: *Anderson's Case* (1); *Re Ternan*, or *Re Tivnan* (2); *Re Windsor* (3).

The crime that was committed, if any, was piracy *jure gentium*, and is therefore justiciable at *Hong Kong*. That being so, he ought not to be given up to the Chinese to be tried by them, but he ought to be tried at *Hong Kong*. But the crime was not piracy *jure gentium;* because, to constitute that, there must have been violence *ab extra*, or the ship must have been run away with for the purpose of depredation.

However, we contend that no crime was committed. The coolies had reasonable ground for supposing that they were deprived of their liberty by the captain and crew of the ship; they took possession of the ship, and used a certain amount of violence with a view to recovering their liberty; and in estimating the amount of violence that would be reasonably necessary under those circumstances, we must apply a different standard in the case of ignorant Chinese coolies from that which would be applied in the case of Europeans.

An appeal ought not to be heard on a case of *habeas corpus*, inasmuch as there is no final conclusion arrived at by the decision of the Judge: *Queen* v. *Bertrand* (4); *Re Nahon and Pariente* (5).

The *Solicitor General* replied.

In the course of the arguments the following were referred to:—*Legislative Assembly of Victoria* v. *Glass* (6); *United States* v. *Smith* (7); *United States* v. *Palmer* (8); *Bennet* v. *Burley* (9).

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June 19.

Judgment having been reserved by their Lordships was now delivered by

THE LORD JUSTICE MELLISH:—

This is an appeal by the Attorney-General of the Colony of *Hong Kong* from a judgment of the Supreme Court of that colony,

(1) 20 Upper Canada Q. B. Rep. 124.
(2) 33 L. J. (M.C.) 201; 9 Cox C. C. 522.
(3) 34 L. J. (M.C.) 163.
(4) Law Rep. 1 P. C. 530.
(5) 2 Knapp, 66.
(6) 7 Moore, P. C. (N.S.) 449.
(7) 5 Wheaton, U. S. 153.
(8) 3 Wheaton, U. S. 610.
(9) 1 Upper Canada Law J. 46.

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whereby the Respondent, *Kwok-a-Sing*, a Chinese coolie, who had been brought before the Court by a writ of *habeas corpus*, was ordered to be released from custody, and an order made thereon dated the 18th of April, 1871, and also from a judgment and order of the same Court, dated the 22nd of May, 1871, whereby he was again ordered to be released from custody.

The first writ of *habeas corpus* was issued on the 7th of February, 1871, and was directed to the keeper of the gaol at *Victoria, Hong Kong*. The return to the writ was dated the same day, and set out a warrant of a police magistrate, which was as follows :—

"Whereas the above-mentioned Defendant was on this date duly convicted before *Charles May*, Esquire, one of Her Majesty's Justices of the Peace for the said colony, for that a communication having been received requiring the rendition of the Defendant, on behalf of the Chinese Government, as a subject of *China*, who has committed certain crimes and offences against the laws of *China* by participating in the murder of a portion of the crew of the French ship *Nouvelle Pénélope;* and it appearing to me, upon investigation of the case, that there is cause to believe that the said Defendant is a subject of *China*, and has committed the said crimes against the laws of *China* by feloniously seizing the said ship at sea, and by murdering the captain and certain of the crew of the said ship on the 4th October last past at sea; and, further, that after the commission of the said crime did feloniously seize a boat belonging to the said ship, and land at a place called *Pakha*, in Chinese territory, on the 11th October aforesaid, and it was thereupon adjudged that the said Defendant, for the said offence, should be committed to gaol for detention pending the receipt of orders from His Excellency the Lieutenant-Governor as to his further disposal.

"These are therefore to command you, the said constable, to take the said Defendant and safely to convey to the said gaol and there to deliver him to the said superintendent or keeper, together with this precept; and I do hereby command you, the said superintendent or keeper, to receive the said Defendant into your custody in the said gaol, and there to imprison him as aforesaid.

"Given under my hand and seal at *Victoria* aforesaid, this seventh

day of February, in the year of our Lord one thousand eight hundred and seventy-one.

"*C. May,*

"Police Magistrate."

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This warrant was issued under an Ordinance of the Colony, No. 2, of 1850. By the IXth article of the Supplementary *Treaty of Nankin*, dated the 8th of October, 1843, called the *Treaty of the Bogue*, it was agreed that, if lawless natives of *China*, having committed crimes or offences against their own Government, shall flee to *Hong Kong*, a communication shall be made to the proper English officer, that the said criminals and offenders may be seized, and on proof or admission of their guilt be delivered up.

Ordinance No. 2, of 1850, was passed by the Legislative Council of the colony, and the material parts of it were as follows [see *ante*, p. 182.]

By the *Treaty of Tientsin*, made the 26th of June, 1858, new provisions were made with regard to the extradition of criminals from the colony of *Hong Kong* to the Chinese Government, in substitution of those of the *Treaty of the Bogue*, which was abrogated.

The depositions taken before the magistrate, and the documents before him, having reference to the committal of *Kwok-a-Sing*, were afterwards brought before the Supreme Court in obedience to a writ of *certiorari*. The depositions contained the evidence of *Wong Akee* and *Chun Assan*, two Chinese who had been passengers, and of *Paul Verret* and *Joseph Simon*, two Frenchmen, who had been seamen, on board the French ship *Nouvelle Pénélope*, which left *Macao* on the 1st of October, 1870, with 310 Chinese coolies on board on a voyage to *Peru*. All the coolies were examined by the Portuguese authorities at *Macao* before they embarked, to ascertain that they went voluntarily; but nevertheless *Wong Akee* said that he was kidnapped, which he explained to mean that he had been persuaded by a fraud to go to the barracoon, and that he told the authorities he was willing to go to *Peru*, contrary to the truth, because, from the threats of the Chinese who brought him there, he was afraid that his head would be cut off if he did not. It was also proved that about 100 of the other coolies said that

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they were kidnapped. There was no proof that *Kwok-a-Sing* had been kidnapped, or that he was among those who said they had been kidnapped. The master of the ship and the charterer selected eight of the coolies to be headmen over the others, and paid them three dollars a piece a month for acting as headmen. *Kwok-a-Sing* was one of those selected. At half-past four on the afternoon of the 4th of October, 1870, when the ship was prosecuting her voyage on the high seas, about twenty of the coolies collected near a seaman, who was keeping guard at a barrier that was placed across the deck, attacked him, and threw him overboard. They afterwards attacked the captain, who was walking unarmed on the deck, killed him, and threw him overboard. They also killed several others of the crew, and obtained complete command of the vessel and changed her course to the coast of *China*. It was positively sworn by *Chun Assun* that *Kwok-a-Sing* was one of those who attacked the captain, and the other witnesses proved that he was one of the coolies who kept the command of the vessel until the vessel arrived back on the coast of *China*. There was also some evidence that *Kwok-a-Sing* and other coolies took possession of the captain's watch and a quantity of dollars on board. When the ship arrived on the coast of *China*, *Kwok-a-Sing* and other coolies left the vessel in a boat. The vessel itself was run aground, and was left to be plundered by the natives.

Among the documents returned by the magistrate to the Supreme Court was the following letter from the Colonial Secretary to the magistrate:—

"*Hong Kong.* Colonial Secretary's Office,
"Sir, 3rd February, 1871.

"I have the honour to acquaint you, by desire of his Excellency the Lieutenant-Governor, that an application has been received from Her Majesty's Consul at *Canton*, claiming on behalf of the Chinese authorities the rendition of the man *Aping*, who is charged with participation in the murder of a portion of the crew of the French ship *Nouvelle Pénélope*.

"I have, &c.,
"*J. Gardiner Austin*,
"Colonial Secretary.

"*C. May*, Esq.,
"First Police Magistrate."

Several objections were made to the validity of the return, and were argued before the Chief Justice. He delivered judgment on the 29th of March, 1871, and held several of the objections to be valid, and afterwards, on the 18th of April, 1871, ordered *Kwok-a-Sing* to be discharged.

On the 26th of April, 1871, the Attorney-General caused *Kwok-a-Sing* to be again arrested on a charge of piracy *jure gentium*, with a view to his trial on that charge before the Supreme Court of *Hong Kong*. The evidence of witnesses was again taken, and *Kwok-a-Sing* was committed for trial. Another writ of *habeas corpus* was issued, and return made setting out the magistrate's warrant, by which he was committed to take his trial. On the 22nd of May, 1871, he was again ordered to be discharged, upon the ground that his second arrest was a violation of the 6th section of the *Habeas Corpus Act*.

The first question which their Lordships will consider is whether, assuming that there was sufficient *primâ facie* evidence against *Kwok-a-Sing* to prove that he was guilty of the murder of the French captain, and that he was guilty of piracy *jure gentium* in running away with the French vessel, these acts constitute crimes and offences against the law of *China* within the meaning of the first section of Ordinance No. 2 of 1850, or crimes and offences against the Government of *China* within the preamble of the same Ordinance. There is no doubt that the extreme generality of the words "crimes and offences against the law of *China*" makes their construction very difficult. They cannot be intended to mean that every Chinese subject who is proved to have done something which the law of *China* makes a crime or an offence is to be given up to the Chinese Government. If this were the meaning of the words, every Chinese who had done something which the law of *China* treats as a political offence, or who had done anything which the law of *China* treats as criminal, though the law of all European countries treats it as innocent, might be given up. Some limitation, therefore, must be put upon the meaning of the words; and their Lordships think that, in determining what that limitation is to be, they ought to bear in mind the position of the colony of *Hong Kong* with reference to *China*. There was, when the treaty was made, a manifest risk that the colony of *Hong Kong* might

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become the refuge of the criminal classes of the city of *Canton* and other Chinese towns; and it was impossible that the Colonial Government could punish Chinese subjects for acts committed within the territory of *China*. Having regard to this object, their Lordships think that the words "crimes and offences" ought to be confined to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of *China*. In the Treaty of *Tientsin* the persons to be delivered up are described generally as criminals. All ordinary crimes—such as murder, robbery, theft, arson—committed by a Chinese within Chinese territory or in Chinese ships on the high seas would be within the meaning of the Ordinance. Their Lordships are also of opinion that piracy, at least in certain circumstances, would be within the meaning of the Ordinance. They think it may properly be assumed, without proof, that *China* has laws to punish piracy on her own coast, and if it was proved that a subject of *China* who had taken refuge in *Hong Kong* was a pirate in this sense, that he was a person who went from the Chinese coast to plunder ships at sea, returning with his plunder again to *China*, they are of opinion that such a person might be given up under the Ordinance. On a claim for the rendition of such criminals as these it would not, in their Lordships' opinion, be necessary to produce the evidence of experts to prove what is the law of *China*.

Their Lordships have now to consider whether there was evidence that *Kwok-a-Sing* had been guilty of crimes against the laws of *China* within the meaning of the Ordinance. He is accused of two crimes, murder and piracy. The alleged murder was the murder of a Frenchman on board a French ship, in which *Kwok-a-Sing* was a passenger, on the high seas. They have, therefore, to consider whether murder by a subject of *China* of a person who was not a subject of *China*, committed outside the Chinese territory, is a crime against the laws of *China* within the meaning of the Ordinance; and they are of opinion that it is not. Their Lordships cannot assume, without evidence, that *China* has laws by which a Chinese subject can be punished for murdering beyond the boundary of the Chinese territory a person not a subject of *China*. Up to a comparatively late period *England* had no such laws. Moreover, although any nation may make laws to punish its own subjects

for offences committed outside its own territory; still, in their Lordships' opinion, the general principle of criminal jurisprudence is that the quality of the act done depends on the law of the place where it is done. Now, the law as to what constitutes murder differs in different places. Suppose that a subject of *China* kills an Englishman within English territory, or on board an English ship, under circumstances which, according to English law, might amount to manslaughter only, could it possibly be right for the English Government to surrender such a person to the Chinese Government to be tried according to Chinese law, to which the distinctions between murder and manslaughter may be wholly unknown. On the whole, therefore, on these two grounds—first, that it cannot be assumed without evidence that there is any law in *China* to punish a Chinese subject for a murder committed upon a foreigner within foreign territory; and, secondly, because, even if it could be assumed that there was such a law, still, this offence having been committed within French territory, ought to be treated as an offence against French law, and not as an offence against Chinese law, their Lordships are of opinion that there was no evidence before the magistrate that *Kwok-a-Sing*, in murdering the French captain, committed an offence against the laws of *China* according to the true construction of the Ordinance.

Their Lordships have next to consider, whether there was sufficient evidence before the magistrate that *Kwok-a-Sing* had committed an act of piracy *jure gentium;* and, if there was such evidence, whether that would make his imprisonment, for the purpose of being delivered to the Chinese authorities, lawful.

Now, their Lordships are of opinion that there was before the magistrate sufficient *primâ facie* evidence that *Kwok-a-Sing* had committed an act of piracy *jure gentium* to justify his committal for trial for that offence at *Hong Kong*. They see no reason to doubt that the charge of Sir *Charles Hedges*, Judge of the High Court of Admiralty, to the Grand Jury, as reported in the case of *Rex* v. *Dawson* (1), and which was made in the presence and with the approval of Chief Justice *Holt*, and several other Common Law Judges, contains a correct exposition of the Law as to what constitutes piracy *jure gentium*. He there says, "Piracy is only a

(1) 13 State Trials, 454.

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sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. . . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." Of course there can be no difference between mariners and passengers, and there was unquestionably evidence that *Kwok-a-Sing* was a party to violently dispossessing the master and carrying away the ship itself and the goods therein; and the only question can be whether there was sufficient evidence that the act was done with a felonious, that is a piratical, intention. In their Lordships' opinion, there was evidence of such an intention on the part of *Kwok-a-Sing* fit to be left to a jury, though they wish to be understood as giving no opinion which way a jury ought to find on this question.

Next, it must be considered what was the legal duty of the magistrate when he had received the evidence; ought he to have signed a warrant enabling the Governor to deliver *Kwok-a-Sing* to the Chinese authorities to be tried for both murder and piracy, or ought he to have committed him to be tried for the piracy at *Hong Kong?* In their opinion he ought to have committed him to be tried for the piracy at *Hong Kong.* They think that the acts of piracy *jure gentium* with which *Kwok-a-Sing* was charged may be plainly distinguished from those acts of piracy which they have before stated to be, in their opinion, within the Ordinance and the Treaties. If Chinese subjects, starting from, and returning to, Chinese territory, attack a ship of some other nation, whether in harbour or at sea, they, making that territory as it were the base of their operations, must be held to commit an offence against the municipal law of *China* and against the Chinese Government, whether they commit an act of piracy *jure gentium* or not; but if *Kwok-a-Sing* committed an offence against the municipal law of any nation, he committed an offence against the municipal law of *France,* to which he was subject at the time, and not against the municipal law of *China;* and if he is punishable by the law of *China,* he is only so punishable because he has committed an act of piracy which, *jure gentium,* is justiciable everywhere. They are of opinion that such an offence is not an offence against the law of *China* within the meaning of the Ordinance. On the

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whole, therefore, they are of opinion that the warrant, by which the magistrate authorized the Governor, if he thought fit, to deliver *Kwok-a-Sing* to the Chinese authorities to be tried by them for murder and piracy, was an illegal warrant, and one beyond his jurisdiction, and that, therefore, the first order of the Lord Chief Justice for the release of *Kwok-a-Sing* was right and ought to be affirmed.

Having come to this conclusion, their Lordships need not give any opinion upon the validity of the other grounds on which the Chief Justice thought that *Kwok-a-Sing* ought, on the first occasion, to be discharged. They think, however, it is right to state that they do not agree with the Chief Justice that the evidence before him proved that *La Nouvelle Pénélope* was a slave-ship, and that *Kwok-a-Sing* and the other coolies, who acted with him, were justified in killing the captain and the French sailors, for the purpose of obtaining their liberty. There was evidence, from which it might be inferred that some of the coolies had, by fraud or by threats on the part of other Chinese, been induced to go to the barracoon, and embark on board the ship against their will. They appear, however, all to have professed to the Portuguese authorities at *Macao* that they were willing emigrants; and there was, in their Lordships' opinion, no sufficient evidence upon the depositions that either the Portuguese authorities at *Macao*, or the French captain and crew, were any parties to compelling any of the coolies to leave *China* against their will.

Their Lordships have next to consider whether the judgment and order of the 22nd of May, 1871, whereby *Kwok-a-Sing* was, for the second time, discharged from custody, was valid. He was discharged solely upon the ground that he had been committed a second time for the same offence, contrary to the 6th section of 31 Car. 2, c. 2. They cannot agree with the construction which the Chief Justice has put upon this section of the statute. The principal object of the section seems to have been to prevent persons, who had been brought up on a writ of *habeas corpus*, and discharged on giving bail and entering into their own recognisance, from being again arrested for the same offence, and obliged to sue out a second writ of *habeas corpus*. This appears from the provision by which the person discharged may be again arrested by the

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order of the Court, wherein he shall be bound by recognisance to appear, or other Court having jurisdiction of the cause. The words "other Court having jurisdiction of the cause," were probably added to meet the case of an indictment having been moved by *certiorari* from one Court to another.

They do not say, however, that the section may not also apply to cases where a prisoner is discharged unconditionally upon the ground that the warrant, on which he is detained, shews no valid cause for his detention. They think, however, it can only apply when the second arrest is substantially for the same cause as the first, so that the return to the second writ of *habeas corpus* raises for the opinion of the Court the same question with reference to the validity of the grounds of detention as the first. In the present case the second warrant is a warrant by which *Kwok-a-Sing* was committed to take his trial at *Hong Kong* for piracy *jure gentium*, and was, in their opinion, a valid warrant. They think he ought not to have been discharged from his custody under that valid warrant because he had been previously discharged from an unlawful imprisonment.

Their Lordships will accordingly humbly recommend to Her Majesty, that the judgments and orders of the Supreme Court of *Hong Kong* of the 29th of March, 1871, and the 18th of April, 1871, should be affirmed, and that the judgment and order of the 22nd of May, 1871, should be reversed, and that there should be no costs of the appeal.

Solicitor for the Appellant: *The Queen's Proctor.*
Solicitors for the Respondent: *Shaen, Roscoe, & Massey.*

RICHARD McCONNEL . . . . . APPELLANT;

AND

ARTHUR H. MURPHY AND JEREMIAH C. MURPHY, TRADING UNDER THE NAME OF ARTHUR H. MURPHY AND CO. . . . . RESPONDENTS.

J. C.*
1873
April 22.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA (1).

Construction of Contract—Words of Expectancy—Estoppel by Pleading.

A. M., on behalf of the firm of *M. & Co.*, merchants, in *Q.*, of which he was a member, entered into the following contract with *R. M.*:

"*R. M.* sells, and Messrs. *M. & Co.* buy, all of the spars manufactured by *R. M.*, say about 600 red pine spars, averaging by culler's measurement in *Q.*, 16 inches, at the sum of, &c., delivered free of charge in *Q.* The above spars will be out of the lot manufactured by *J. B.*, the lengths of which, according to his specification, I am satisfied with."

The lot manufactured by *J. B.* was found to consist of 603 spars, of which only 496 averaged 16 inches:—

Held, upon the construction of the contract, that *M. & Co.* were bound to accept the 496 spars at the rate agreed on, the words, "say about 600 red pine spars," being words of expectation and estimate only, and not amounting to a warranty.

Where the declaration shews substantially a contract, and a tender in compliance with it, the Plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance.

THIS appeal was brought from the decision of the Court of Queen's Bench for the province of *Quebec, Canada*, pronounced in an action which was instituted by the Appellant, a person engaged in the lumber trade, residing in *Ottawa*, against the Respondents, who were timber merchants at *Quebec*, for not accepting certain red pine spars in fulfilment of a contract of sale entered into between the parties on the 22nd of April, 1864; and the principal question to be decided by the appeal was the true meaning of such contract of sale.

* *Present*:—SIR JAMES W. COLVILE, SIR ROBERT J. PHILLIMORE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

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The course of business in the lumber trade appears to be as follows:—A lumberer (as a person engaged in the trade is called) obtains from Government the right to cut timber within certain limits for a small rental, subject to the payment of dues on the timber cut. He then sends into the limits a party of woodsmen to fell trees, cut off the branches, and roughly dress them. The woodsmen are under the control of a person called a sparmaker, who selects the trees to be cut and superintends the mode of their dressing; and the value of spars in the market depends partly upon the known skill and experience of the spar-maker by whom they have been made. The spars are then brought down in rafts to *Quebec*, and are there re-dressed by licensed persons called cullers, who measure them on behalf of Government, for the purpose of ascertaining the amount of the Government dues. The size of spars consists in their length and the number of inches of their girth, and their value increases greatly with their size. The spar-makers send forward to their employer an estimate of the probable size of the spars, allowing for the reduction that will take place by the re-dressing at *Quebec*, and the spar-makers usually allow so liberally for the loss of size on this re-dressing that the actual culler's measurement is usually from one-half to one and a half inches greater than the estimate sent down from the woods.

The cost of preparing the spars is often advanced in part by the lumberer's agents at *Quebec*, who then exercise a control over the sale of the spars in order to secure them repayment.

The facts of the present case were as follows:—

In the autumn of 1863 the Appellant, *McConnell*, who carried on his business of lumberer on the *Petewawa* river, employed a spar-maker named *Brousseau*, who was known for his experience and skill, to superintend the making of a lot of spars, giving him special directions that on an average their size should amount to 16 inches.

Brousseau accordingly prepared, during the winter of 1863-64, 603 spars, which were known in the trade as "*Brousseau's* lot," and he forwarded to the Plaintiff a specification of their estimated sizes, the average size being $15\frac{2}{3}$ inches. *Brousseau*, however, informed the Plaintiff that he had made so large an allowance in his estimate for their loss in re-dressing, that he had no doubt that

their average size when measured by the cullers at *Quebec* would be 16 inches.

The Plaintiff sent the specification of the sizes of the spars to Messrs. *Ross & Co.*, who had advanced him money on them, and acted as his agents, that they might offer the spars for sale.

The Respondents, Messrs. *Murphy & Co.*, having seen the specification, but not the spars themselves, entered into communications with the Appellant with reference to the purchase of the spars, and the following written contract was eventually drawn up and signed by both parties:—

"*Ottawa*, 22nd April, 1864.

"*Richard McConnel*, Esq., sells, and Messrs. *Arthur H. Murphy & Co.* buy, all the spars manufactured by *Richard McConnel*, Esq., say about six hundred red pine spars, averaging by culler's measurement in *Quebec* sixteen inches, at the sum of thirty-four dollars currency, as follows, viz:—

One-third—cash,
One-third—60 days,
One-third—90 days,

or all cash less two and a half per cent, on two-thirds of the amount, delivered free of charge in *Quebec* during the season of 1864, optional with sellers to choose terms of payment. The above spars will be out of the lot manufactured by Mr. *John Brousseau*, the lengths of which, according to his specification, I am satisfied with. The whole subject to approval of Messrs. *Ross & Co.* of *Quebec*.

"(Signed) *Richard McConnell.*"

"Five hundred dollars to be paid to Messrs *Ross & Co.* on return of Mr. *Murphy* to *Quebec*.

Messrs. *Murphy & Co.* then applied to Messrs. *Ross & Co.* to ratify the contract, who agreed to do so subject to certaina lterations, and the following indorsement was made on the back of the contract:—

"*Quebec*, 25th April, 1864.

"Messrs. *A. H. Murphy & Co.*,

"Gentlemen,

"We approve of the sale of the spars made to you by Mr. *R. McConnell.* Received the five hundred dollars' deposit on account of Mr. *Richard McConnell.*

"(Signed) *Ross & Co.*

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"It is understood that Messrs. *A. H. Murphy & Co.* are bound to take the spars whenever they come down, whether in 1864 or 1865, and that Mr. *R. McConnell* is bound to deliver them as early as possible.

"(Signed) *Arthur H. Murphy & Co.*
"*Ross & Co.*"

The spars reached *Quebec* in June, 1865, and were then measured by a licensed culler, when it was found that 496 pieces out of the lot averaged 16 inches, whilst the remainder were slightly under that average. On the 11th of June, 1865, the said 496 pieces were tendered by the Plaintiff to the Defendants, and by them refused. Subsequently, on the 20th of June, 600 spars averaging 16 inches, 104 of them being of another lot (only a few of which were manufactured by *Brousseau*) were tendered to the Defendants and refused. The value of the spars had fallen, between the date of the contract and the 20th of June, 1865, from $34 to $15.

On the 9th of August, 1865, the Appellant commenced this action against the Respondents for not accepting the spars so tendered in fulfilment of the contract, and claimed $10,000 as damages.

The declaration was as follows:—

"*Richard McConnell*, of the township of *Hull*, in the county of *Ottawa*, in *Lower Canada*, lumber merchant, complains of *Arthur H. Murphy* and *Jeremiah C. Murphy*, both of the city of *Quebec*, merchants and co-partners, trading under the name of *Arthur H. Murphy and Co.*, and by this declaration represents that heretofore, to wit, on the 22nd day of April, 1864, at *Ottawa*, the said Plaintiff being then engaged in the business of manufacturing and causing to be manufactured red pine spars, the said Plaintiff and Defendants did conclude and agree to and with each other respecting the purchase and sale of about 600 red pine spars. That the said Plaintiff, on the day and year aforesaid, at *Ottawa*, did agree with the Defendants to sell, and did then and there sell to the Defendants, who then and there bought of the Plaintiff all the spars manufactured by the Plaintiff, that is to say, about 600 red pine spars, which should average by culler's measurement in *Quebec* 16 inches, at the rate or sum of $34 currency each, payable one-third cash and one-third in sixty days, and the remaining third in ninety days, it being, however, optional with the Plaintiff to elect to be paid all in cash, and in such case a reduction of 2½ per cent. should be made on two-thirds of the price of the said spars. That the Defendants agreed with the Plaintiff on the day aforesaid to pay him for the said spars at the rates aforesaid, and subject to his election to be paid in cash, and declared that they were satisfied that the said spars so to be delivered should be taken out of a lot of spars manufactured by Mr. *Jean Brousseau*. That the Plaintiff agreed to deliver the said spars to the Defendants

free of charge in *Quebec* during the season of 1864. That the Plaintiff and Defendants further agreed that the foregoing mentioned contract should be approved of by Messrs. *Ross & Co.*, of *Quebec*, before the same should be binding upon them, and that a sum of $500 currency should be paid into the hands of Messrs. *Ross & Co.* for the Plaintiff on the return of Mr. *Murphy*, to wit, the said *Arthur H. Murphy*, to *Quebec*, on account of the contract.

"That on the 25th day of the said month of April the said *Ross & Co.* did approve of the said contract, and the Defendants did pay into their hands the said sum of $500.

"That on the day last aforesaid the Defendants did bind themselves to the Plaintiff to take the spars whenever they came down, whether in the year 1864 or the year 1865, the said Plaintiff being bound to deliver them as early as possible.

"And the Plaintiff avers that he caused the spars as manufactured by Mr. *Jean Brousseau* to be conveyed to *Quebec* as early as possible, and that the same arrived in *Quebec*, that is to say, within the harbour of *Quebec*, in the month of June last past. That the said spars were duly measured, and in the said lot there were found only 496 pieces which averaged 16 inches by culler's measurement in *Quebec*. That the said 496 spars were duly tendered by the Plaintiff to the Defendants on the 14th day of June last past, and he, the Plaintiff, having declared his option to be paid in cash, was then ready and willing, and did then offer to deliver the same to the Defendants, who, without assigning any reason, refused to receive and pay for the same under said contract.

"And the Plaintiff further avers, that on the 20th day of June, last past, the Plaintiff being possessed of the said 496 red pine spars and of 104 other red pine spars, which averaged by culler's measurement in *Quebec* 16 inches, and which in all respects were equal in quality and value to the said 496 red pine spars, did tender and offer to deliver to the Defendants the said 496 red pine spars and the said 104 red pine spars, forming together 600 red pine spars averaging by culler's measurement in *Quebec* 16 inches, in fulfilment and execution of the said contract, electing at the same time to be paid in cash; but the said Defendants, without assigning any reason, refused to receive and pay for the same, whereupon on the day last aforesaid the Plaintiff, by the ministry of *Campbell* and another, notaries, protested against the Defendants for their said refusal.

"And the Plaintiff saith, that afterwards, to wit, at *Quebec*, he caused the said 600 red pine spars to be sold by public auction in the usual and accustomed manner, and after the public notice of the same had been given. That the said spars were so sold to the highest and best bidder for the sum of $9150. That the costs and charges of the said auction amounted to $150.56c., which, being deducted from the said $9150, leaves as net proceeds $8999.44c. That the price or value of the said spars, according to the said contract was $20,600, which the Defendants should have paid to the Plaintiff.

"And the Plaintiff further saith that the said spars were not, in the month of June last, worth in *Quebec* more than $15¼ each.

"And the Plaintiff further saith that, although he hath in all things well and duly complied with the contract and was ready to perform the same according to its true intent and meaning, which was that he should deliver to the Defendants about 600 red pine spars, averaging by culler's measurement in *Quebec* 16 inches,

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as early as possible in the years mentioned, yet the Defendants have wrongfully refused to receive the said spars, and thereby the Plaintiff hath been deprived of the gains and profits which he might and otherwise would have made had the Defendants received and paid for the said spars. That by reason of the premises the Plaintiff hath sustained damage amounting to the sum of $10,789.31c. currency, which the Defendants are liable to pay, and have promised so to do, but now refuse.

"Whereupon the Plaintiff prays that, by the judgment of this Court, the Defendants may be condemned jointly and severally to pay to the Plaintiff the said sum of $10,789.31c. currency, with interest and costs."

On the 21st of November, 1865, the Defendants filed their perpetual peremptory exception in law, by which they stated that the Plaintiff committed a breach of warranty in delivering 496 spars averaging 16 inches in length, out of *Brousseau's* lot, instead of 600 of the same, and that although the Plaintiff afterwards offered another lot of said spars, yet this other lot was not the lot purchased by the Defendants; and also that the said pretended sale by auction was not a real or *bonâ fide* sale, and that the said spars were never sold by public auction, but remained the property of the Plaintiff.

The Plaintiff by a general answer filed on the 24th of November, 1865, denied the truth of the Defendant's allegations in his perpetual peremptory exception.

Evidence having been taken, the case was heard in the Superior Court before the Chief Justice *Meredith*, who on the 9th of September, 1869, gave judgment in favour of the Plaintiff, and assessed the damages at $8,800, with interest from that day, and costs of suit.

On the 16th of September, 1869, the Defendants took proceedings to review the said judgment before the superior Court, sitting in review, at *Quebec*.

On the 31st of December, 1869, the parties were heard before the Chief Justice *Meredith* and Justices *Stuart* and *Taschereau*, sitting in the Court of Review at *Quebec*, when the Court took time to consider their judgment.

On the 4th of February, 1870, the Court of Review delivered judgment, affirming the judgment of the Court of the 9th of September, 1869.

On the 17th of June, 1870, the Defendants filed their factum

in appeal in the Court of Queen's Bench (Appeal side) praying for a reversal of the judgment. The Plaintiff also filed a case as Respondent in the appeal

On the 17th of December, 1870, the Court—present, The Chief Justice *Duval*, and Justices *Caron*, *Drummond*, *Badgley*, and *Monk*,—were of opinion that the Defendants were justified in rejecting the said spars, and that the Plaintiff had failed to fulfil his contract, and they reversed the said judgment with costs, and granted the Defendants *distraction de dépens;* but Justices *Caron* and *Drummond* were of opinion that the judgment of the Court of Review should have been affirmed.

The Plaintiff appealed to Her Majesty in Council against the judgment of the Court of Queen's Bench.

The following is an extract from the judgment of Mr. Justice *Badgley*:—

"It is plain that a specified entire quantity of a specified dimension, out of a specified manfactured lot, entered into the contemplation and the intention of both parties concurrently and formed their contract. In this contract the consideration is entire in fact, on both sides, and in such cases the *entire* fulfilment of the promise by either is a condition precedent for the fulfilment of any part of the promise by the other. In entire contracts a part fulfilment would be an absolute contradiction in terms. The circumstances of the particular case as here make the contract entire, and the criterion is to be found in the question whether the whole quantity is of the essence of the contract. If, therefore, as laid down by *Story* in his Treatise on Contracts, although the terms of the contract afford the rule for the apportionment of the consideration, yet if there be a special agreement to take the whole, and if the evidence clearly shew that such was the purpose of the parties, the contract would be entire. Thus, where the agreement is absolutely and unconditionally to take the whole of the quantity at the certain rate per measure, and there is no usage of trade creating a different rule, the contract will be considered as an entirety and not a separate sale of each portion measured, the measure being only a means of estimating the gross sum, and the quantity sold being an entire quantity. In this case, as proved in evidence, the contract contemplated an entire quantity and an

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entire price without apportionment, and must be so considered in accordance with the rule laid down by Lord *Brougham* in the known case of *Casamajor* v. *Strode* (1), that the entirety of the contract is founded upon the question whether the circumstances shewed that the purchaser would not have bought except in the expectation of receiving the whole. Now, if any doubt really existed which the contract itself and the evidence could not dissipate, it would be obligatory to go to the uncontradicted rule of our own law that the ambiguity as to what was intended must be held against the vendor; upon this point, our own law must be our guide as embodied implicitly in the contract itself, the English law being confined to the proof of it, and the rule is thus given, '*C'est le vendeur qui doit expliquer clairement ce à quoi il s'oblige; le doute doit s'interpréter contre le vendeur dans le cas même où ce doute s'élève sur l'étendue des obligations qu'il a contracté; c'est-à-dire, non-seulement en tant qu'il s'agit du prix qu'il stipule, mais encore en tant qu'il s'agit de la chose qu'il promet. Le vendeur en effet dans celles même des clauses où il semble jouer le rôle du promettant, joue toujours en réalité le rôle de stipulant, il connaît sa chose, et il sait mieux que personne à quelles conditions il veut se dessaisir, c'est donc lui qui est le maître du contrat et qui en dicte les conditions. Cujas dit:* In venditionibus semper legem dicit venditor rei suæ,' or, as the rule is laid down by old *Loisel*, in his Institutes Coutumières, 'Qui vend le pot vend le mot,' '*et il ajoutait avec non moins de vérité* qu'il y a plus de fols acheteurs que de fols vendeurs, *car le vendeur précisément parce qu'il connaît sa chose a bien des moyens de tromper l'acheteur qui ne la connaît pas. Voyez Pothier, Vente*, No. 234. *On a donc raison d'exiger du vendeur qu'il s'explique clairement, il doit être tenu selon la règle d'expliquer ce à quoi il s'oblige, c'est en effet être tenu virtuellement d'expliquer pourquoi on s'oblige et moyennant quoi.*' The judgment appealed from sets aside all these principles of law and fact, and after setting aside the 104 *Maclaren* spars as not being in the contract, in terms makes the contract several by condemning the Defendants to receive 496 spars in fulfilment of the averred, and proved, and intended entire contract of 600. The judgment is objectionable in parcelling an entire contract contrary to the intention of the

(1) 2 My. & K. 706.

contracting parties as proved by and acknowledged by themselves, and in substituting another which is neither averred nor proved; where the contract is entire, as here, a full performance is a condition precedent to Plaintiff's right of action. For all these reasons I think the judgment appealed from should be set aside, the contract having never been carried out by the Plaintiff, Respondent in this cause."

In the judgment of Mr. Justice *Drummond* the following passage occurs:—

"The sole question in the case turned on the interpretation of the contract. On behalf of the Appellants it was contended 'that the subject of the sale was all the spars manufactured by *Brousseau*, and that there was a warranty on the part of the seller that the lot would consist of about 600 pieces, and that they would average 16 inches.' The Respondent, on the contrary, maintains that the sale was of all the spars in *Brousseau's* lot, which, taken together, should be ascertained by culler's measurement in *Quebec* to give an average of 16 inches, and that according to this view his first tender should have been accepted. I have given the case serious consideration, and, in my opinion, the position assumed by the Respondent is correct. That the sale was not a sale of all *Brousseau's* lot, as the Appellants contend, is clear, not only from the words of the first part of the contract, but from the clause at the end, which says that the spars sold '*will be out of the lot manufactured by Jean Brousseau.*' To give any other meaning to the contract would be to violate some of the most important rules founded on common sense and adopted by all civilized countries for the interpretation of written instruments. For it is universally admitted that in construing a deed every *part of it must be made, if possible, to take effect, and every word must be made to operate in some shape or other.* (See *Broom's* Legal Maxims, p. 414; also *Shep.* Touch. 84; *Plowd.* 756.)

"It is also acknowledged that the Court should not introduce any words which are not to be found in the deed, nor strike out of a deed words which are there, in order to make the deed different (*Broom's* Legal Maxims, p. 417). Now, to give an interpretation to the covenant under consideration other than that which I hold,

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the Court must inevitably refuse to give effect to the very clear and intelligible words '*out of the lot manufactured by Jean Brousseau*,' or, in other terms, strike them out altogether.

"Coming to the interpretation of the words '*say about* 600 spars,' I am of opinion that they do not involve the stringent warranty insisted on by the Appellants. The word 'say' is very different from the words 'more or less,' so common in covenants in this country, and so fully commented on by our authors. The word 'say' leaves a much broader margin than '*more or less*.' It is equivalent to the words '*supposed to be*,' leaving everything in doubt as to precise quantity, and should be interpreted in a very wide sense in favour of the obligee, especially in a case like this, where the covenant was made in the backwoods, while it was known to both parties, as well as to all lumberers in that region, that the precise measurement could be ascertained only by the culler's report at the port of *Quebec*."

Mr. *H. Matthews*, Q.C. (with whom was Mr. *Watkin Williams*, Q.C.), for the Appellant:—

The spars were not to be all *Brousseau's* lot, but out of *Brousseau's* lot. This is not a case of the sale of an entire quantity and an entire price. It is clear from the principle of selection out of 603 spars that the whole was not bought; nor is there any warranty to be found in the mention of the probable number of the spars. Lord *Abinger's* judgment in the case of *Gwillim* v. *Daniell* (1) is in point. He there holds that the words "say from 1000 to 1200 gallons" were words expressing expectation only, and not an undertaking that such should be the quantity. And the authority of that case was recognised in *Leeming* v. *Snaith* (2) though the words being different in the latter case the decision was against the vendor: the words "say about 600 red pine spars" apply only to the quantity manufactured, and do not refer to the quantity which was likely to average 16 inches in girth.

It is true the declaration sets out the offer of 600 spars, and relies on that in the alternative as a fulfilment of the contract, but it sets out the contract itself sufficiently and shews a tender of 496 spars of the required measurement out of the lot manu-

(1) 2 C. M. & R. 61. (2) 16 Q. B. 275.

factured by *Brousseau*, and the effect of this is not impaired by what is said alternatively.

[He also referred to *Cockerell* v. *Aucompte* (1), and *Covas* v. *Bingham* (2).]

Sir *John B. Karslake*, Q.C., and Mr. *Bompas*, for the Respondents:—

The rule of construction of the Canadian law applicable to this case is to be found in Art. 1019 of the *Civil Code of Lower Canada*, viz., "In cases of doubt the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation." So, by the French law, on which the law of *Lower Canada* is founded, the vendor is bound to make out a definite contract, or if there be two constructions, the benefit should be given to the vendee to elect which he thinks best. The *Code Civil* says, in Art. 1602 (see *Troplong, Droit Civil expliqué*, tom. i. pp. 346, 351). "*Le vendeur est tenu d'expliquer clairement ce à quoi il s'oblige. Tout pacte obscur et ambigu s'explique contre le vendeur.*" The principle is laid down by Lord Chief Justice *Tindal*, in his judgment in the case of *Borrodaile* v. *Hunter* (3): "Words of insurers introduced by themselves for their own exemption and protection from liability are to be taken most strongly against those that speak the words, and most favourably for the other party."

The vendor, by his declaration, has put his own construction on the contract, for he relies on the tender which he made of the additional spars procured by him to complete the number, and he is estopped from now asserting that the contract is different from what he alleged.

Mr. *Matthews*, Q.C., in reply.

The judgment of their Lordships was delivered by

Sir Montague E. Smith:—

This is an action brought by the Plaintiff (the Appellant), who is engaged in the lumber trade, and resides in *Ottawa*, against the

(1) 2 C. B. (N.S.) 440. (2) 2 E. & B. 836.
(3) 5 Scott N. R. 446.

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Respondents, who are merchants at *Quebec*, for not accepting a quantity of timber under a contract of sale.

The defence made to the action was, that the timber tendered was not in compliance with the contract, and therefore that the Defendant (the Respondent) had a right to reject it.

The circumstances which led to the contract are as follows: The Plaintiff had cut a quantity of timber in *Ottawa*, and the person whom he had employed in cutting it was a man of the name of *Brousseau*, who appeared to have considerable reputation for his skilful mode of selecting and cutting timber. It seems that *Brousseau* had sent down to *Quebec*, to an agent of the Plaintiffs, a specification of the timber he had cut. From that specification it appears that the quantity of spars cut was 603. The length of the spars is given, and also the square or the girth. The important matter to be considered in this appeal, as far as measurement goes, is the square or girth of the spars. The specification shewed spars of varying girths ranging from as high as 20 inches to as low as 14 inches, the average of the whole specification being 15½ inches. The course of business appears to be that the spars are dressed in the woods where they are cut, but roughly dressed there, and that in the specification, which is sent down to *Quebec* after that dressing, and in which the measurements are stated, allowance is made for a further dressing, which is to take place in *Quebec*, by persons called cullers, who not only measure the spars there for the purpose of the Government revenue, but again dress the spars, and to some extent reduce their girth. The course seems to be that the persons who first dress the timber in the woods in their estimate of the square or girth of the timber make a large allowance for what is likely to be the reduction in the second dressing, and so large that the spars will, when measured by the cullers, exceed the measurement which they insert in their specification. That mode of inserting the girth in the specification appears to be known to those engaged in the trade, as both parties in this case were.

After the specification had been sent down, interviews took place between one of the Respondents and the agent of the Plaintiff, in which the specification was shewn to the Defendants, and after having seen it, and with a knowledge of the general

circumstances of the trade, the contract in question was made. Undoubtedly there was one fact which was in the knowledge of the Plaintiff's agent, and which does not appear to have been communicated to the Defendants, namely, the fact that in this particular case *Brousseau* had informed the Plaintiff's agent that he had no doubt that the spars would measure, according to the culler's measurement, 16 inches upon the average. However, that really was only communicating in this particular case the fact which was generally known throughout the trade, resulting from the mode in which the measurements were usually made.

The whole question turns upon the construction of the agreement. The agreement is in these terms:—"*Richard McConnell*, Esquire, sells, and Messrs. *Arthur H. Murphy & Co.* buy, all of the spars manufactured by *Richard McConnell*, say about 600 red pine spars, averaging 16 inches by culler's measurement in *Quebec*, at the sum of $34 currency, payable as follows." And then the mode of payment is stated. "The above spars will be out of the lot manufactured by *Jean Brousseau*, the lengths of which, according to his specification, I am satisfied with." The time for the delivery of the spars was afterwards enlarged in consequence of the impossibility of bringing down the rafts to *Quebec* from the state of the river, but no question turns upon that enlargement of the time. It was not until 1865 that the spars reached *Quebec*, and when measured by the cullers it turned out that the whole lot did not average 16 inches, but that out of the whole there was a quantity of 496 spars only which reached the full average of 16 inches. That fact being ascertained, the 496 spars were formally tendered to the Defendants, who refused them, giving no reason for their refusal. It is plain that at this time the price of spars had very considerably fallen, and that it was not to the interest of the Defendants to complete the sale. They do not disguise that they were unwilling to take the spars in that state of the market. The question is whether they were justified in refusing to accept them.

The construction put upon the contract by the Defendants in order to justify their refusal to accept the spars, which, upon the average, did measure the girth stipulated for, is that the Plaintiff was bound to tender to them about 600 spars of this

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average, and that they were not bound to accept any less quantity when tendered. That is the ground of their defence, and the question is, whether their view of the contract is right, namely, that it does contain a description of the thing sold which binds the seller to deliver that quantity, and justifies the vendee in refusing to accept any smaller quantity.

Upon the best consideration that their Lordships have been able to give to this contract, which is not free from some difficulty, they are of opinion that the Defendants have not sustained their contention. The substance of the contract appears to be that so many of the spars manufactured by the Plaintiff through his agent *Jean Brousseau* as would together average 16 inches according to culler's measurement should be delivered to the Defendants. The contract does not appear to be a sale of the whole quantity manufactured by *McConnell* through *Brousseau*. If it had been it would have been differently expressed. The words are "*McConnell* sells, and *Murphy* buys, all of the spars manufactured by *McConnell*, say about 600 red pine spars, averaging by culler's measurement in *Quebec* 16 inches." Now if the words "say about 600 red pine spars" are omitted, it is a sale of all of the spars manufactured by *McConnell* averaging by culler's measurement so much. It seems to be a reasonable construction to hold that the parties were referring to such of the spars so manufactured as should together average by the culler's measurement, which was to be a future measurement, so many inches. That the whole lot mentioned in the specification was not intended to be sold is made plain by the subsequent part of the contract, which provides that the above spars, that is, the spars sold, will be out of the lot manufactured by *Brousseau*, the lengths of which, according to his specification, the vendee expressed himself satisfied with. The words "out of" render it clear that the whole lot was not the subject of the sale. The meaning of the parties appears to be that out of this lot of 603 spars coming down, which was to be measured by the cullers, the vendee, desiring to have spars of a certain girth only, was willing to take so many as would satisfy his requirements as to girth, and would not take any which would reduce the average below that girth.

It is said, on the part of the Respondents, that the Plaintiff

warranted that the whole which so came down, or, at all events, as many as about 600, should average 16 inches. If that had really been the intention, one would have expected words more clearly expressing it. The words used are, "say about 600 red pine spars." The same words may have different meanings according to the context in different contracts, but looking at the way in which the words are used here, "say about 600 red pine spars," the words "say about" appear to be thrown in for the purpose of guarding the vendor against being supposed to have made an absolute condition as to quantity. There is not merely the word "about," which in itself creates some uncertainty, but "say about." These two words used together seem to be employed for the purpose of shewing that nothing absolute or definite in the way of allegation of quantity was intended on the part of the vendor.

Their Lordships are supported in the construction which they put upon the words in this contract by the case of *Gwillim* v. *Daniell* (1), in the Court of Exchequer. There, in a contract to manufacture a quantity of naphtha, and to supply it at stated intervals, the words were, "say 1000 to 1200 gallons per month." The Court, in putting a construction upon those words, held that they did not amount to a warranty that the manufacturer would supply that number of gallons, but only to an assertion of his belief that that was the quantity he should be able to supply. The words are almost identical with those in the present case; "say from 1000 to 1200 gallons" are certainly not more uncertain than "say about 600 spars." This case is an authority that, unless there is something in the context to give them a more positive signification, such words ought not to be construed as words of warranty.

The same word "say" was found in another contract, which came before the Court of Queen's Bench in *England*, and received a construction in the case of *Leeming* v. *Snaith* (2). The contract was, that *J. S.*, Defendant, sold to *L.* and *C.* what he may pull up to the 6th of January, say not less than 100 packs, of combing skin at so much per pound. There the words "not less than 100" were very definite; they were negative words defining a minimum quantity. The word "say," which pre-

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ceded them, was held by the Court not to introduce uncertainty into words which were in themselves definite. The previous authority of *Gwillim* v. *Daniell* was referred to, and was certainly not overruled. Mr. Justice *Patteson*, in referring to it, distinguishes the case then under decision. He says, "I agree that the insertion of the words 'not less than' distinguishes this case from *Gwillim* v. *Daniell*. There the words 'say from 1000 to 1200 gallons' were held to be words of expectation only, and not an undertaking that such should be the quantity."

Their Lordships think that in this case the words "say about 600" were really words of expectation and estimate only, and did not amount to an undertaking that the quantity should be so much. The measurement was to be future, the spars were to be paid for at so much for each spar, not in a round sum, and the natural construction of the words appears to be that the quantity expected to come up to the average is about 600 spars. No fraud or intentional deception being charged against the Plaintiff, their Lordships think that the Defendant was bound to accept the quantity which was offered to him, and that the Plaintiff has substantially performed the agreement which he entered into, and is entitled to damages for the breach of it.

There is another mode of construing the agreement upon which some observations have been made during the discussion, namely, that the words "say about 600 red spine spars" apply only to the quantity manufactured, and that they do not refer at all to the quantity which was likely to average the 16 inches in girth. Their Lordships, however, consider that the parties were referring, in using those words, to the number that might turn out on the average to be of 16 inches girth, and that this is a more natural interpretation of the words than to treat them as descriptive of the whole quantity manufactured by the Plaintiff. Reading them in this way their Lordships still think that they are words of expectation and estimate only.

It has been said that this contract ought not to be construed by the principles which the Courts of *England* would adopt, but upon rules of the Canadian law, founded upon the old French law.

In mercantile contracts, and indeed in all contracts where the meaning of language is to be determined by the Court, the govern-

ing principle must be to ascertain the intention of the parties, through the words they have used. This principle is one of universal application.

It is seldom, in mercantile contracts, that any technical or artificial rule of law can be brought to bear upon their construction. The question really is the meaning of language, and must be the same everywhere. There may be rules to assist the Courts in the construction of contracts in certain cases, and some have been referred to as existing in the law of *Canada*, but they do not interfere with the decision to which their Lordships have come. It may be clear that by the law of *Canada* a vendor cannot enforce a contract unless the thing which he has sold can be definitely ascertained. If the contract is so obscure that the subject-matter of the sale cannot be identified or the terms of the sale defined, the vendor could not enforce the contract. So also in cases of doubt, it may be that the interpretation should be against the vendor, but that must be understood of cases of doubt which cannot be otherwise solved. It would follow from these rules, that where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator and in favour of the other party. But their Lordships think that this contract is not properly capable of two meanings. In questions of difficult interpretation, not only two, but frequently many constructions may be suggested. And, after all, there must be one true construction; and if that true construction can be arrived at with reasonable certainty, although with difficulty, then it cannot properly be said that there are two meanings to the contract.

Their Lordships think that the interpretation at which they have arrived is one that the contract reasonably bears, and that it is the true meaning which ought to be placed upon it. The contract, although short in its terms, has undoubtedly given occasion to great difference of opinion in the Courts below, and the parties are to some extent responsible for the litigation, because they have chosen to use language difficult to construe. There are no questions upon which Courts differ more frequently than upon this class of cases. In the present action the Judges of the Superior Court were unanimous in favour of the Appellant, whilst in the

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Court from which this appeal comes a majority only decided in favour of the Respondents. Two of the Judges were in favour of the present Appellant, and one of them, Mr. Justice *Drummond*, placed his judgment upon much the same ground as their Lordships have rested their own decision.

It is right, perhaps, to notice that an argument in favour of the construction of the Respondents was derived from the Plaintiff's declaration. It was said that he had himself put a construction upon the contract which estopped him from now asserting that it was different from that which he had then alleged. Their Lordships, however, think that the Plaintiff is not so estopped. His declaration sets out substantially what the contract is. There is a slight variance, not affecting however the substance of it, to be found in that part which refers to the manufacture by *Brousseau*. But substantially he sets out the contract, and alleges the tender which was made, and which their Lordships think was a sufficient compliance with it, namely, the tender of the 496 spars, which averaged 16 inches. He sets out in his declaration, no doubt, an alternative case, namely, his having acquired from another merchant a sufficient quantity to make up 600 spars, and a tender of that number. Their Lordships intimated during the argument that, in their opinion, that would not be a compliance with the contract, which related to spars manufactured by *Brousseau*, supposing there had been a condition that the quantity sold should be 600 spars. But the insertion of that alternative case in the declaration does not interfere with the other statements which are independent of it, and which shew substantially the contract and a tender in compliance with it.

In the result their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the judgment of the Court of Queen's Bench, and to direct that the judgment of the Superior Court be affirmed, and that the Respondents should pay the costs of the appeal in the Court of Queen's Bench. They must also pay the costs of this appeal.

Solicitor for the Appellant: *J. T. Simpson.*

Solicitors for the Respondents: *Bischoff, Bompas, & Bischoff.*

THE LINDSAY PETROLEUM COMPANY . APPELLANTS;

AND

PROSPER ARMSTRONG HURD, ABRAM FAREWELL, AND JOHN KEMP . . . . } RESPONDENTS.

J. C.*
1874
Jan. 19.

ON APPEAL FROM THE COURT OF ERROR AND APPEAL OF ONTARIO IN CANADA.

Fraud—Rescission of Contract—Reconveyance—Laches.

A. having two parcels and *B.* one parcel of land, supposed to contain petroleum, it was agreed between them and *C.* that *C.* should pay them $10,000 for the land if he succeeded in forming a company for the purpose of working the oil springs, and in inducing such company to pay him $13,750 as the price of the land, out of which he was to keep for himself $3750. *B.* accordingly, assuming the character of owner, gave to *C.* a conditional promise to sell all the land to him for $13,750, provided the offer was accepted within a certain time. *A.* wrote a letter, meant to be shewn to, and which was shewn to, persons intending to become members of the new company, and was proved to have influenced them, in which letter he recommended the purchase, not disclosing that he had any interest therein. *A.* and *B.* actively co-operated with *C.* throughout the whole transaction.

The company, in ignorance of the combination, accepted the proposal, but having discovered the fraud, sued for a rescission of the contract:—

Held, that the contract must be wholly rescinded, the price repaid, and the land reconveyed.

There being a doubt (owing to the expiration of the term for which the company had been constituted) whether the company was competent to receive the money and to execute a reconveyance, the order provided that the repayment should be made to the company, or to such other persons as were entitled in their right, on the reconveyance of the lands being made to the satisfaction of the Colonial Court.

Fraud being established against a party, it is for him, if he allege laches in the other party, to shew when the latter acquired a knowledge of the truth and prove that he knowingly forbore to assert his right.

IN the month of April, 1866, the Respondent, *Hurd*, who was residing at *Lindsay*, in the province of *Ontario*, obtained from the Respondent, *John Kemp*, of the village of *Oil Springs*, in the county of *Lambton*, a written offer to sell him the three parcels of land following, namely: First, a block of 25 acres; secondly,

* *Present*:—THE LORD CHANCELLOR, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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another block of 25 acres; and, thirdly, a block of 12½ acres; provided the offer were accepted within a month from the date thereof. The price mentioned in the offer was $13,750, one half of which was to be paid at the time limited for the acceptance of the offer, and the residue by subsequent instalments. The effect of the offer was that *Hurd* was not bound to buy, but *Kemp* was bound to sell if *Hurd* came with his money in time.

Kemp was in fact the owner of only the first lot mentioned in the offer. The Respondent, *Abram Farewell*, was the owner of certain shares in the second and third lots, and he had power to contract, and did contract, to sell the whole of those two lots to *Hurd;* but it was arranged between the Respondents that *Kemp* should appear to be the sole vendor of the whole, and that, for that purpose, *Farewell* should nominally sell the second and third lots to *Kemp*, and *Kemp* should sell or agree to sell all the lots to *Hurd;* and in the negotiations for the formation of the company hereinafter stated, and subsequently thereto, the fact that *Farewell* was one of the vendors was concealed by all the Respondents.

Hurd had no intention of completing the purchase of these lands unless he could resell them. His intention was to get up a company who should purchase the lands at the price named in the offer and work the oil springs, and with this view he returned to *Lindsay*, taking with him the offer which he had so procured. His object and intention were known to *Kemp* and to *Farewell*.

After his return to *Lindsay*, *Hurd* endeavoured to get up a company accordingly, and he called upon various persons, and endeavoured to persuade them to take shares or stock in such a company. With this view he produced, not only the offer in writing which he had procured from *Kemp*, but also a letter written by *Farewell*, in which he referred to the three several lots mentioned in the offer, and spoke of the whole in favourable terms, and stated that it was a good investment at the price, and that he would himself have taken the land had he known it could have been obtained at the price mentioned in the offer. This letter was stated, in the proceedings in the cause, to have been lost.

Farewell was known through the part of the country in which *Hurd* proposed to form the company, and was reputed to have

acquired knowledge respecting oil lands. *Hurd* procured the letter from *Farewell* for the express purpose of using it in effecting a re-sale. He knew that the parties whom he expected to induce to purchase the lands did not know the value of lands in the district, and he believed that the opinion of *Farewell* (he being apparently a disinterested party) would favourably influence intending purchasers. *Farewell* wrote the letter in order that *Hurd* might shew it to parties wishing to purchase, and in order that they might be influenced by his opinion expressed therein. *Farewell* also stated to persons who were considering whether they should become stockholders in the company that the investment was a good one at the price.

A meeting was held at *Lindsay* on the 30th of April, 1866, got together by the exertions of *Hurd;* and was attended by about twenty or thirty persons. *Hurd* produced at the meeting the offer which he had procured from *Kemp*, and also the letter which he had obtained from *Farewell*.

The parties present passed a resolution to form themselves into a company to buy the lands at the price named in the offer, and an agreement to take stock in the company was at the same meeting signed by several of the persons present to an amount sufficient to pay the first half of the purchase-money, and it was afterwards signed by others. *Hurd* put his name down at the head of the list for $1000, and said he thought he would take $500 more. He was appointed president of the company, and Mr. *J. D. Smith*, who was the manager of the *Ontario Bank* at *Lindsay*, was appointed secretary and treasurer, and several sums of money were paid to the latter in respect of the subscriptions for stock in the company. *Hurd* was authorized at this meeting to complete the purchase and pay the money on behalf of the company.

In pursuance of the said resolution, the *Lindsay Petroleum Company* was incorporated under the provisions of the *Statutes of Canada*. *Hurd* accepted the appointment of president of the company, and acted in that capacity.

On the 1st of May, 1866, *Hurd* went to *Oil Springs* for the purpose of completing the purchase on behalf of the intended company, accompanied by *Thomas Sadler* and *David Browne*, who subsequently became stockholders in the company. They arrived

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there on the 2nd of May, and *Hurd* shewed the parcel of 12½ acres (which was the most valuable part of the property) to *Sadler* and *Browne*. *Sadler* and *Browne* had a conversation with the Respondents, *Kemp* and *Farewell*, who gave them their opinions as to the value of the lands, but nothing was said by *Kemp* or by *Farewell* as to their being interested in the lands. *Sadler* and *Browne* acted in the matter merely for their own satisfaction, and not as agents or otherwise on behalf of the intended company.

On the following day one half of the purchase-money mentioned in the offer was paid to *Kemp*, and an agreement in writing, dated the 3rd of May, 1866, was prepared, whereby *Kemp* agreed to sell the said lands to *Hurd* for $13,750, payable one half in cash, and the balance by two instalments on the 18th of May and the 3rd of June then next. The agreement was written out by *Farewell*, and in consequence of an objection made by *Thomas Sadler*, the agreement was altered so as to shew that *Hurd* was a trustee for the intended company. The payment was made to *Kemp* by *Hurd*, on behalf of the company, partly in cash (being moneys subscribed for stock in the company), and partly by means of two drafts, which were drawn by *Hurd* on *John D. Smith*. The drafts (which are in the handwriting of *Abram Farewell*) were indorsed by the said *Hurd*, *David Browne*, and *Farewell*, and one of the drafts was indorsed also by the said *Thomas Sadler*. The said drafts were cashed by the bankers at *Oil Springs*, the amount being carried to the credit of *John Kemp*. The cash was paid to *Kemp* in the presence of *Farewell*, and the latter knew that it was paid on behalf of the company. The bills were duly honoured and paid out of the moneys of the company, and the residue of the $13,750, the purchase-money mentioned in the said offer and agreement, was afterwards fully paid to *Kemp* out of the moneys of the company.

After the residue of the purchase-money had been so paid, *Kemp*, by deed dated the 13th of June, 1866, conveyed the lands mentioned in the offer hereinbefore stated to *Hurd*, the consideration expressed in the deed to be paid to *John Kemp* being $13,750, and *Hurd* shortly afterwards executed a deed or deeds in favour of the company.

On the 20th of January, 1868, the Appellants, the *Lindsay*

Petroleum Company, having then recently ascertained that *Farewell* was, at the date of the offer and sale hereinbefore mentioned, interested in part of the lands comprised in the sale, and that he was in fact one of the vendors of the lands, filed their bill of complaint in the Court of Chancery for the province of *Ontario* against all the above-named Respondents, and thereby alleged, amongst other things, that *Hurd* acted as a trustee for the Appellants in entering into the said agreement of the 3rd of May, 1866, and that the money paid thereunder was the money of the Appellants. And the Appellants, by their bill, in effect charged that until recently they believed, as the Respondents represented to them, that *Farewell* had no interest in the lands, or any of them, at the time of the purchase thereof by the Appellants, and also believed that *Hurd* gave the Appellants all the benefit and advantages derived by him from his bargain with *Kemp*, and that the Appellants acted in the matter of the purchase in the belief that they had the benefit of the unbiassed judgment and disinterested advice of *Hurd* and *Farewell*, and relied on the judgment and advice of those in whom they had confidence in the matter. But that the Appellants had recently discovered that there was a fraudulent combination between the Respondents in reference to the sale, and that the lands secondly and thirdly described in the said agreement in fact belonged to *Farewell*, and that he, whilst he pretended, in writing the letter procured by *Hurd* as before mentioned, to be giving his real disinterested opinion, really wrote the same in order to induce the Appellants to make a purchase by which he might profit; and that *Hurd*, while he pretended to be advising the Appellants as one in a position common to himself and the other stockholders, and having no independent interest, really had an independent and adverse interest, which made it the more profitable to him the higher the Appellants paid for the land; and that the Respondents were all interested in effecting the sale to the Appellants, and divided between themselves the profits arising therefrom. And the Appellants charged that *Hurd*, with the knowledge of, and by arrangement with, the other Respondents, derived a profit and advantage in the said transaction in fraud of his duty as president of the company and trustee for it. And the Appellants by their bill prayed that the sale and

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conveyance of the lands might be cancelled and rescinded, and the Respondents ordered to repay to the Appellants the purchase-money, or that the Respondents might be ordered to account for the profit derived by the Respondent *Hurd* from the purchase.

It was ascertained from the answers and examination of the Respondents, that the price of $13,750 mentioned in the provisional offer procured from *Kemp*, and in the agreement of the 3rd of May, 1866, and in the conveyance of the 13th of June, 1866, was not the true price, but a nominal price inserted by fraudulent collusion between the Respondents, for the purpose of enabling the Respondent *Hurd* to make a profit out of the transaction, the true price being $10,000. The true price of the 1st Lot of 25 acres was $100 an acre, the nominal price being $150. The true price of the 2nd Lot of 25 acres was $50 an acre, the nominal price being $75. The true price of the 3rd Lot of 12½ acres was $500 an acre, the nominal price being $650. It further appeared that the nominal price for the whole of the lots having been paid to *Kemp*, he retained the real price for the 1st Lot, of which he was the owner, and paid *Farewell* the real price of the 2nd and 3rd Lots, in which *Farewell* was interested, and returned the balance to *Hurd*.

The Respondents, *Abram Farewell* and *John Kemp*, put in their answer to the bill, and thereby admitted that *Farewell* had an interest in the lands secondly and thirdly mentioned in the offer procured by *Hurd*. They alleged that they believed that the Appellants, the *Lindsay Petroleum Company*, did not make the purchase in reliance upon the representations of *Hurd* and the allegations contained in the said letter of *Farewell*, but that, on the contrary, the so-called stockholders refused to organise any company or purchase the said lands from *Hurd* until they had selected two of their number—who subsequently became stockholders therein—to visit and inspect the lands, and to inquire as to the fitness of the same for the purposes of the company, and to ascertain the value thereof; and they further alleged that two such persons, *Browne* and *Sadler*, were so appointed, and visited the lands, and made diligent and careful inquiry as to the said lands, and reported very favourably thereon, and that so the Appel-

lants agreed to organise the company and purchase the lands from *Hurd*. And by their said answer they further alleged that they believed that it was expressly understood that if *Browne* and *Sadler* should report unfavourably, the formation of the company should not be proceeded with; and that if they had so reported, the lands would not have been purchased from *Hurd*.

Kemp and *Farewell* also, by their answer, alleged that they made no representations to *Hurd* for the purpose of inducing the company to purchase from him (*Hurd*) or from them.

Abram Farewell, by the answer, admitted that he gave *Hurd* a letter containing an expression of opinion as to the merits of his proposed purchase, but alleged that the statement contained in the said letter that he would have taken the land had he known it could have been obtained at the price, related only to the lands firstly mentioned in agreement, and in which he had no interest whatever, and alleged that the said letter was not written for the purpose of misleading the Appellants, or any other person. And that *Hurd* distinctly gave him to understand that he was purchasing for himself, and not for any one else, and certainly not as a trustee for any person or company, and further that he believed the said agreements (meaning the provisional offer and the agreement of the 3rd of May, 1866), were with, and the conveyance to, *Hurd* as an individual, and not as a trustee, so far as he could remember, and that he was not informed that the money paid for the lands was the money of the Appellants.

Farewell and *Kemp*, by their answer, submitted that the Appellants, by delays and laches, had precluded themselves from any relief in the cause.

Hurd also put in his answer to the said bill. His answer contained similar allegations as to the letter written by *Farewell*. He also denied that in making the purchase from him, the Appellants relied upon the statements contained in the said letter, and alleged that *Browne* and *Sadler* were appointed a committee to visit and inspect the lands on behalf of the company, and that they visited the said lands as directed, and made diligent, faithful, and careful inquiry as to the said lands and neighbouring lands, and as to the actual selling price of the same, and that it was upon their judgment and recommendation, formed after such examina-

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tion, that the parties were induced to form the company, and accept his, *Hurd's*, proposal for the purchase of the lands.

Hurd, by his answer, also denied that he procured the agreement of the 3rd of May, 1866, as a trustee for the Appellants, and alleged that, on the contrary, he was acting in an independent position, having procured the agreement mentioned in the 3rd paragraph of the said bill (being the provisional offer hereinbefore mentioned) solely for his own benefit, and claimed to be entitled to the profit made by him (which in his answer he calls the commission received by him), as a remuneration for his time, trouble, and expenses connected with the selection of the lands, and conducting the negotiations for the purchase thereof, and he alleged that the Appellants were precluded from relief by delays and laches.

On the 7th of May, 1868, replication was filed in the said cause.

The cause came on to be heard before the Vice-Chancellor *Sprague*.

At the conclusion of the arguments the Vice-Chancellor delivered judgment in favour of the Appellants. The following is an extract from his judgment :—

"The company would naturally suppose that the price to be paid for the land to *Kemp* and *Farewell* was the price named in the agreement, or rather that *Kemp* was the sole vendor at that price. *Farewell* wrote a letter to *Hurd*, setting forth the situation of the land, its advantageous position, and value; and the letter contained a passage to the effect that if the writer had been aware that the property was in the market he would himself have purchased at the price. It is suggested that this passage applied only to one of the three parcels—the *Kemp* lot; but upon the whole of the evidence, it is in favour of its relating to the whole property. This letter was used by *Hurd* at a meeting called by him, with a view to the formation of a company, and had, as appears by the evidence, great weight in inducing the formation of the company.

"At this meeting two papers were produced: one the agreement with *Hurd*, the other the letter of *Farewell*. From the former it would appear that *Kemp* was the sole vendor and *Hurd* the purchaser optionally at the price named in the agreement. The

letter of *Farewell* was produced as the opinion and judgment of one conversant with the subject, and with the purpose of assisting the judgment of those to whom it was read. It conceals two important considerations. One, that the purchase-money expressed was not the true purchase-money, but some thousands of dollars more. The other, that the writer was not giving a disinterested opinion, but was himself interested, being a vendor of the greater part in quantity and very far the greater part in price of the land sold.

"As to *Hurd*, his representations to the meeting amounted to this: That the purchase-money he was to pay was that expressed. His production of the agreement amounted to this, looking at the occasion upon which it was produced. It is different from the expressed consideration in a conveyance. What was produced was an offer from an assumed owner of land to sell at a certain price provided the offer was accepted within a limited time, and with it was produced a letter predicated upon the expressed purchase-money being the true purchase-money. This, without explanation, was a representation that the true purchase-money was the same as that expressed. This was a misrepresentation and a fraud upon those to whom it was made. It was also a fraud to use the letter of *Farewell*, to guide the judgment of those to whom it was read. The conclusion, from the agreement being in the name of *Kemp* only, was that he was the sole owner and vendor, concealing the fact that the writer was the owner of the greater part; this was a *suppressio veri*, which was equivalent to a fraudulent representation. The letter would, of course, have had less weight, if known that the writer was the owner of a large portion. In this view it is not material that there was no fiduciary relation between *Hurd* and the company. If there was not, there was still a relation of confidence between the parties. He proposes that others shall embark with him in a common adventure—that they shall become partners together. Their position is not that of vendor and purchasers, but it was one of confidence, in which he was bound to use perfect good faith with those with whom he was dealing.

"The claim in *Hurd's* answer, that it was understood that he should be compensated by what he calls (miscalls) commission, is not established. It is, in fact, negatived from the nature of the transaction, and from what transpired at the meeting when *Hurd*

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asked and the meeting agreed that he should be compensated in a different way. As to the company not relying upon these representations, but judging for themselves and relying upon their judgment after personal inspection of two of their number, the evidence as to this fails altogether to establish anything of the kind. Two members of the company went up to examine for themselves; they were not deputed by the company. The one of the two examined proves this. Supposing it proved that a committee was deputed, was their report the only thing relied upon? It would be difficult to say that the representations of *Hurd* and the letter of *Farewell* had no weight, but the company did not, by a committee, or otherwise, form an independent judgment. So far as to *Hurd*.

"As to *Farewell:* He was cognizant of the fact that the amount of purchase-money expressed in the agreement was not the true purchase-money, but greatly exceeded the true amount. He knew this as to his own land, and had reason to suppose the same as to the *Kemp* land, and he knew also that *Hurd* contemplated the formation of such a company as he did form. He gave the letter for the purpose of its being used as it was. It could not, indeed, have been used, or intended to be used, for any other purpose.

"He joined *Hurd*, and combined with him in two things: in writing the letter and in giving the agreement the form that it had; without its having that form the letter would have been useless. In addition to this, is what passed at the personal conference at which *Brown* and *Sadler* were present. The remarks applicable to *Hurd's* case, apply generally to *Farewell*.

"As to reinstating them in their position, the Defendants may, if they desire it, have an account of any profits, if any, made by the company.

"*Hurd* and *Farewell* are in *pari delicto*. They were both active in the representations made to the company, and the decree against both of them will be for repayment of the whole sum paid by the company for the purchase of the lands in question; the whole of the parcels, as well those sold by *Kemp* as those sold by *Farewell*."

On the 15th of December, 1868, the Vice-Chancellor delivered judgment on a point on which it appears that the former judgment

was not final, viz. as to liability of *Kemp*, and the proper decree to be made against him, when His Honour decided that no distinction could be made in his favour, and directed repayment to be made with interest, the company on their part re-conveying at the expense of the Respondents the land conveyed. The re-conveyance to be to the party or parties who may repay the Plaintiffs. The decree to be with costs against all parties.

The decree was dated the 15th of December, 1868. It was thereby ordered that the sale and conveyance of the said lands should be cancelled and rescinded, and that the Respondents should repay to the Appellants the sum of $13,750, together with the sum of $2,257·76 interest thereon from the date of the payment of the said purchase-money to the time thereby appointed for payment, making together the sum of $16,007·76. And that the Respondents should pay the said sum into the *Canadian Bank of Commerce*, in the city of *Toronto*, to the credit of the Appellants on or before the 15th day of February, 1869. And it was ordered that upon such repayment being made a re-conveyance of the said land should be executed from the Appellants to the Respondents. And it was ordered that the Respondents should pay to the Appellants their costs of the suit.

By an order made in the cause on the 12th day of February, 1869, it was ordered that upon *Abram Farewell* paying into Court to the credit of the cause the sum of $16,007.76, together with the sum of $15.30, being subsequent interest on the sum of $13,750, making the sum of $16,023.06, on or before the 22nd day of February then instant, all proceedings under the said decree for the recovery and realisation of the said sum should be stayed until after the rehearing of the cause.

Farewell paid the sum of $16,023.06 into Court to the credit of the cause, and it was afterwards invested in the purchase of dominion stock.

The said cause was re-heard before the full Court of Chancery, consisting of the Chancellor, the Vice-Chancellor *Spragge*, and the Vice-Chancellor *Mowat*, who were unanimous in holding that the decree of Vice-Chancellor *Spragge* was right, and by an order dated the 3rd day of July, 1869, the said decree was affirmed with costs, to be paid by *Farewell*.

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By an order dated the 28th day of August, 1869, the time for appealing against the decree in the said cause was extended.

The said *Abram Farewell* presented his petition of appeal to the Court of Error and Appeal against the said decree, praying that the same might be reversed or varied.

The appeal was heard on the 3rd of January, 1870, in the presence of six Judges.

The Chief Justice *Draper*, after stating the circumstances of the case, and referring to the evidence, from which he drew the same conclusions as the Vice-Chancellor, continued as follows :—

"I have found no authority nor heard any argument to bring me to the conclusion that, where two or more parties combine for the individual and several profit of each, and even in different proportions, in fraudulent statements and untrue representations to attain their object, they are not each liable to the full extent to make good to the injured party the loss their conduct has occasioned to him.

"It has, however, been suggested that, considering the delay of the Plaintiffs in filing their bill, and that they had entered into possession of the lands or some part thereof and had commenced to sink a well or wells in search of oil, they could not justly be held to have the sale of the lands by the Appellant and *Kemp* set aside, and to have the price which these parties respectively demanded and received for their interests returned to them, and that all which they had really lost was the amount which is called '*Hurd's* discount,' amounting to $3750.

"I have, upon further reflection, but not without much hesitation, adopted this view, and am of opinion that to this extent the decree should be varied, by omitting so much as relates to the cancellation of the sale, and by reducing the sum to be repaid by the Defendants to the Plaintiffs to such sum as may be found by the master as the difference between the real and nominal price of the land, with interest from the date of the payment of the purchase money, and no costs to either party."

The Chancellor (late Vice-Chancellor) *Spragge* was of opinion that the decree should be affirmed. He thought that there was no ground upon which to fix the company as purchasers at the

price paid to the vendors, or indeed at any price; and that there was no ground upon which to take the case out of the general rule. He was therefore of opinion that the bargain, being obtained by fraud, should be set aside. He further observed:—

"With regard to the delay in filing the bill, laches can only count from discovery of the fraud, and there is nothing to shew that in this case the bill was not filed promptly after its discovery. If, indeed, it were made to appear that these purchasers had been lying by after discovery of the fraud to see whether their purchase would turn out a profitable one or not, it would be a ground for refusing them relief altogether. But nothing of this kind appears. The scheme of these Defendants was intended to be kept secret. They cannot say that it was kept secret so long as the Plaintiffs ought not to be relieved against it. It lies upon them to shew that it became known to the Plaintiffs so long before they filed their bill that they should be taken to have acquiesced in the purchase with knowledge of the means by which it was brought about, or to have lain by advisedly to see how it would turn out."

Mr. Justice *Gwynne* concurred with the Chief Justice and the Chief Justice of the Common Pleas in thinking that the decree ought to be varied. The learned Judge reviewed the circumstances of the case, as he considered them to be proved by the evidence. He appears to have differed from others as to the character in which *Browne* and *Sadler* acted in the examination of the land, and to have considered that it was their inspection, and not *Farewell's* letter, which led to the conclusion of the contract, and to have considered also that the Appellants had, by delay and laches, lost their right to rescind the contract. "I see no evidence," he observed, "to shew when the parties to be affected did, in fact, discover, or might by reasonable inquiry have discovered, the facts of which the Plaintiffs now complain, unless it be in the evidence of Mr. *Orde*, a witness called by the Plaintiffs themselves. This gentleman was one of the original parties who, at the meeting of the 30th of April, contemplated making the purchase and forming the company; he subscribed for stock to the amount of $2000. He went up about the beginning of June to see the lands: this was before the company was formed. He bought while there two and a half acres adjoining part of the

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lands sold, at $1000 per acre; from the information he then acquired, he thought the price of land was going down; 'There was,' he says, 'a well sunk about a half a mile, and another about a mile from the twelve and a half acres; they were not producing wells: the parties owning one of them said they were only making $5 per day; a lot adjoining was shortly afterwards offered to me at $75 per acre. Lot 15, in the 4th concession, seemed out of the way of oil.' Notwithstanding this information, the proceedings for forming the company are continued, and, on the 2nd of July, the last instalment is paid; before the last instalment then was paid, the intending purchasers had two months during which they not only might have made, but appear to have made, independent inquiries to guide them in the completion or rescission of the contract. In July Mr. *Orde* and Mr. *Martin* were sent up by the company to register the company's agreement forming the company in the county where the lands lie: while there, upon that occasion, the witness says: 'Mr. *Martin* and I went up to *Sarnia* to make the declaration as to the company. This was in July. I then began to lose faith in *the oil wells* and *in this company.* Mr. *Melville Parker* told me the transaction *was a swindle; and that the twelve and a half acres could have been got for one-third of the money. Parker* told me this in July. The lot adjoining the twelve and a half acres was offered to me, while at *Oil Springs*, at $75 an acre.' Now this was certainly information calling upon the parties interested to make inquiries which, if made, would have been calculated to elicit a knowledge of the facts which are now complained of: it seems reasonable to assume that they did make inquiries, and as the Plaintiffs, who must know when the original purchasers first heard of the matter of which, as a company, they now complain, offer no other evidence than *Orde's* upon the point, although their attention is drawn by the answers of Defendants to the fact that they rely upon the Plaintiff's laches, it is not unreasonable to conclude that *Orde* is the medium through whom the knowledge of the facts, of which they now complain, was acquired, and that the time of its being acquired was in the month of July, four months before they took the deed of the 31st of October, 1866; and that they have called him as a witness, to establish by him this point.

"I see nothing in the evidence to shew that after the execution of that deed, the Plaintiffs acquired any knowledge upon the points complained of, which they had not then, or might not then have had, if they had made such inquiries as I think they were bound to do, upon the information which they have shewn they possessed, through *Orde*, in July; if they intended to keep alive any right to seek redress by rescission of the contract. They, however, proceeded with the contemplated works; sank a well or wells, whether successfully or not does not appear, and took no measures to avoid this contract until they had for eighteen months proceeded with the works, enjoyed the benefit of the purchase, and sought to obtain to their own use the profit of a speculation which, from its very nature, must have been known to all the parties engaged in it to be highly risky and speculative, but enormously remunerative, if successful.

"Under such circumstances I do not think that the Plaintiffs have made out such a case as entitles them now to a cancellation of the deed and a rescission of the contract; but they are still entitled to a decree against *Hurd* to make good to the company the $3750 which he, in breach of trust, made out of the Plaintiffs, with interest from the 3rd of May, 1866, and the other Defendants should be decreed to reinstate that amount in default of the Plaintiffs being able to collect it of *Hurd;* this is the utmost extent to which the decree should, in my opinion, go, and this is the decree which *Tyrell* v. *Bank of London* (1), in appeal, warrants. The decree should be primarily against *Hurd*, who was alone guilty of a breach of trust, which is a fraud different in its character from that committed by the other Defendants. All the purposes of justice are, as it appears to me, obtained by decreeing the party guilty of that breach of trust to restore the fruits of his fraud. And in case he should be unable, by decreeing the other Defendants to do so for him."

A majority of the Court of Error and Appeal agreeing with the Chief Justice *Draper*, it was ordered on the 5th day of February, 1870, that the decree and order on rehearing in the said cause be varied, in so far as the same directed the cancellation and rescission of the sale and conveyance of the lands in the said plead-

(1) *Bank of London* v. *Tyrell and Read*, 10 H. L. C. 47. 8 Jurist 849

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ings mentioned, and also in so far as the said decree and order on rehearing directed the said Respondents, *Prosper Armstrong Hurd*, and *John Kemp*, and *Abram Farewell*, to repay to the present Appellants the sum of $16,007.76, and counsel for all parties agreeing to waive any reference in respect thereof, it was further ordered that the said Respondents, *Prosper Armstrong Hurd* and *John Kemp*, should forthwith pay, and in default of their so paying, that the said *Abram Farewell* should pay unto the present Appellants, instead of the said sum of $16,007.76, the sum of $3750, being the difference between the actual and the nominal price of the said lands, together with interest, which said principal sum of $3750, and interest thereon, computed to the 15th day of the present month, amounted to the sum of $4,590.76.

And with these directions it was further ordered that the causes be remitted back to the said Court of Chancery to do thereon as to the said Court should seem meet.

By an Order of the Court of Chancery made in the cause and dated the 11th day of February, 1870, it appearing that the Respondent, *Abram Farewell*, had paid to the Appellants the sum of $4,590·76, it was ordered that the Dominion stock in which the said sum of $16,023·06 paid in under the said Order of the 12th day of February, 1869, had been invested and amounting to the sum of $15,260.05, should be forthwith transferred to the Respondent, *Abram Farewell*, and that the dividends accrued due thereon should be also forthwith paid out to him.

The present appeal was brought from the said Order of the Court of Error and Appeal.

On the case being called on for hearing, Sir *Richard Baggallay*, Q.C., and Mr. *Ferrers*, for the Respondent *Farewell*, took a preliminary objection to the hearing of the appeal, viz. that the Appellant company was a corporation whose duration was limited by the law of *Canada* to five years, which term had expired since the appeal was brought.

The LORD CHANCELLOR:—Their Lordships will now hear the counsel for the Appellants, and you will be at liberty to urge this point at the conclusion of their argument.

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Mr. *Kay*, Q.C., and Mr. *Smart*, for the Appellants:—

By an agreement between *Hurd*, *Kemp*, and *Farewell*, who were to divide the profit, *Hurd* was enabled to put a false price on the lands and to deceive the company, to whom he stood in a fiduciary relation. *Kemp* and *Farewell* knew that *Hurd* did not mean to take the land unless he could induce the company to purchase. All the judgments agree as to the fraud which was practised. The judgment of the Court of Appeal reduces the relief given to the Appellants to a sum merely representing the difference between the true and the false price, partly because the Appellants had sunk a well. But where there has been fraud in a contract of sale there ought to be an absolute rescission, unless the nature of the thing sold has been actually altered by the purchaser. The person defrauded has his option to rescind or to adopt: *Rawlins* v. *Wickham* (1). The Respondents say that the Appellants had an opportunity of judging before they bought, but that would not save the Respondents, as they unquestionably committed a fraud. The Appellants did not really test the value of the purchase by experiment, because they did not test it with knowledge.

They had no means of learning the truth, no clue to the fraud. Information to the witness *Orde* was not information to the Appellants: In *Bank of London* v. *Tyrell & Read* (2), where *Read*, the confederate of the principal actor in the fraud, was not in a fiduciary relation, it was remarked by Lord *Westbury* that he ought to have been retained as a surety for the payment by the principal, and not to have been dismissed. There has been some discussion as to whether *Farewell* stood in a fiduciary relation or not, and some variance in the judgments as to relief against him. He drew the agreement which could only have been intended to be shewn, for it contained the untrue prices. The original decree of the Vice-Chancellor was right. It is said that the Appellants have lost their remedy through their own laches. Laches means inaction with one's eyes open: *Rolfe* v. *Gregory* (3); *Savery* v. *King* (4). The time runs from the discovery of the fraud. Here

(1) 3 De G. & J. 304.
(2) 27 Beav. 273; 10 H. L. C. 47.
(3) 13 W. R. 357.
(4) 5 H. L. C. 627.

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only fifteen months intervened between the execution of the purchase deed and the institution of the suit.

It lay on the Respondents to shew that we knew all the time: *Bennet* v. *Colley* (1); *Wall* v. *Corkwell* (2); *Charter* v. *Trevelyan* (3). The Appellate Court in *Canada* has varied the decision of the Lower Court, and altered the relief given, through confounding mere lapse of time with laches; whereas it was not shewn on the part of the Respondents that the Appellants were chargeable with any delay after the fraud was discovered.

Sir *Richard Baggallay*, Q.C., and Mr. *Ferrers*, for the Respondent *Farewell*, took, in the first place, the preliminary objection that the Appellants sued as a corporation duly constituted under certain Canadian Acts. Those Acts require all companies to fix a period for their duration, and in this case five years was the time fixed. Those five years have expired, and some proceeding is necessary to supply the defect. There is no one to whom the Respondents can make payment if ordered to pay.

The LORD CHANCELLOR:—That objection was taken without effect in the pleadings. There may be some provision in the Canadian law to meet the case. Take the ordinary case of a person appellant dying. Surely the Respondent, knowing of it, ought to call attention to it, that the proper steps may be taken. I never heard the fact mentioned for the first time at the hearing.

Sir *Richard Baggallay*:—As to the merits of the case: the ground on which the Courts below proceeded are clear. Assuming that *Hurd* stood in a fiduciary relation to the intended company, and sold the lands to it for more than he gave to the vendors, concealing the fact; he was not allowed by the first Court to keep the profits which he made, and his two co-defendants having abetted him, the sale was rescinded. On the same assumed facts, the Court of Error deprived him of his profits, and held the co-defendants liable in the second degree; but the Court of Error held that as the Appellants delayed so long, and as they had tested for themselves the value of the property, they were not entitled

(1) 2 My. & K. 225. (2) 10 H. L. C. 229.
(3) 11 Cl. & F. 714.

to a rescission of the contract, but only to be recouped the profits of the sale.

What is alleged against *Farewell* is, that in the letter which he wrote to influence purchasers he concealed his ownership. But there is a law in *Canada* which requires registration, and makes registration notice to all the world. The property was worth the price set on it. The people he was dealing with went and satisfied themselves as to the value and then purchased and paid for it.

In the letter as described (for it is not forthcoming) there was no representation that *Hurd* was only charging what he paid. The persons who inspected the land on behalf of the company were about to be its managers, or at least trustees, and may, therefore, be assumed to have had some knowledge of the subject. If there was misrepresentation as to value, the company did not act upon it. There is variance between the allegations of the bill and the proofs. The case against *Farewell* has been treated as if it had been against *Hurd*.

The Plaintiff's company has ceased to exist by efflux of time.

At the close of the argument, the judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Court of Error and Appeal of *Ontario* does not appear to have differed from the two Courts below so far as the substantial merits of this case were concerned. The point on which three judges of the Court of Appeal, who had not been concerned in the earlier stages of the case, differed from two other judges who had taken part in those earlier stages, and on which they founded their alteration of the judgment of the Vice-Chancellor and the Chancellor, was this, that they thought the Plaintiffs had lost their option to rescind the entire contract by the delay which had taken place in the assertion of their right, accompanied, as we must suppose they considered themselves entitled to presume, with knowledge sufficient to make that delay material.

Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his con-

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duct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. In this case the delay was at all events not of very long duration, because the conveyance to the company was dated about fifteen months before the filing of the bill; the whole purchase-money was not paid before that time; and there is nothing which would justify us in reckoning the currency of time from an earlier period than that conveyance. Neither were any acts done in the interval, as it appears to us, at all material to the equity between the parties. There was possession taken, no doubt, but it would be a very novel proposition that mere possession is to be a bar, so as to raise a counter equity in cases of this description. Nothing appears to have been done beyond the sinking of a single well, by way of trial, upon the ground. The sinking of that well, if the land is restored, can in no substantial way operate to the prejudice of the Respondents; and, if any profit had been derived from it, the Court of first instance offered an account of that profit; but it manifestly was known that there was none, for that account was not accepted. The situation of the parties having, therefore, in no substantial way been altered, either by the delay or by anything done during the interval, there is in these circumstances nothing to give special importance to the defence founded on time, even had there been such an allegation of facts in the pleadings as would have been proper, if it was meant seriously to rely upon this as a substantial defence to the suit. There is a submission at the end of the answer; but the substance and body of the answer

contains no allegation by which that submission can be supported; and it does not seem to us that the parties went to issue upon any statement of facts, one way or the other, which fairly raised a question of laches or delay. In order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily—and certainly when the delay has been only such as in the present case—necessary that there should be sufficient knowledge of the facts constituting the title to relief. What knowledge is there allegation or proof of here? Allegation there is none. The answer does not suggest that the statement in the bill, of recent discovery, is in point of fact incorrect; and the absence of any such suggestion in the answer is, at least, an excuse to the Plaintiffs for not having gone into particular evidence as to the time at which and the manner in which the company made the discovery.

But this matter does not remain upon the mere absence of averment in the pleading; for there is evidence given by the Defendants themselves, that is, by Mr. *Hurd*, who distinctly states, and all the statements of the other parties are consistent with it, that he never informed the Plaintiffs or any of the people interested in the company of the fact that the price named in the written documents was not the real price paid to the vendors. The way in which he expresses it is, he never informed them of the discount which he was to receive. Therefore, it is admitted that the transaction was carried through, the material fact on which the equity depends being at the time suppressed; and that being admitted, it clearly was for the Defendants and not for the Plaintiffs to shew when that which was concealed at the beginning became known afterwards. Also Mr. *Farewell* distinctly admits that in his communications with the parties he did not mention the fact of his interest; and it was for him again, admitting that the existence of that interest was not mentioned in the first instance, to shew when and by what means the company became aware of it, if that was material to his defence. It is said indeed, in one of the judgments of the Court below, that one of the Appellant's witnesses, Mr. *Orde*, stated something to have taken place in the month of July, 1866, from which the company ought to have either derived the requisite knowledge, or at least to have been put upon inquiry. We think

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it is not possible for us to take that view of Mr. *Orde's* evidence. All he says is this, that in July he began to lose faith in the oil wells and in the company, and that a Mr. *Melville Parker* told him, about that time, that the transaction was a swindle, and that the 12½ acres could have been got for a third of the money. But mere inadequacy of value would have been no ground for rescinding the purchase. It is not because the purchasers have given more money than the thing was worth, or because a stranger calls it a swindle, only suggesting that the consideration is excessive, that an equity would arise upon which such a bill as this could be filed; nor is this bill filed upon any such ground. It is impossible for their Lordships to infer from that statement that anything was said by Mr. *Melville Parker* from which the Plaintiffs could understand that he meant to say or to suggest that the money which they had paid, or any part of it, had found its way back into the pocket of their president, Mr. *Hurd*, or that Mr. *Farewell*, upon whose opinion they had relied as a disinterested adviser as to value, was not disinterested in his advice. No such things are said to have been suggested by Mr. *Melville Parker*, and we cannot infer or imply them.

There is, therefore, as it appears to us, no evidence whatever of any knowledge on the part of the company, or of those who could bind the company. There is evidence of the original concealment and suppression of the material facts constituting the title to relief, and there is nothing against the averment in the bill not really contradicted by the answer, that those facts were recently discovered when the bill was filed.

It appears therefore to their Lordships that the objection of delay entirely fails; and, further, we have some difficulty in reconciling the decree actually pronounced by the Judges in the Court of Error, not against *Hurd* alone, but also as against the other parties, with the force and the weight which that Court has attributed to delay. It is undoubtedly true that a delay, which might be available by way of defence to persons not under any fiduciary relation or obligation, might not be available by way of defence to those who are affected by a fiduciary relation or obligation; but the Court below, in holding Mr. *Kemp* and Mr. *Farewell* responsible for the repayment of the money which found its way to Mr. *Hurd's*

pocket, have held Mr. *Farewell* and Mr. *Kemp* to be affected by knowledge of and participation in the fiduciary obligation which lay upon Mr. *Hurd;* and the fiduciary obligation extending to them for that purpose, it is difficult to see how the Court could stop there, and refuse to extend it to them for every purpose connected with the whole transaction, which was one entire transaction, and, as their Lordships are of opinion, cannot be severed as to its parts.

An argument has been addressed to us, not with very great confidence, against the unanimous opinion of all the Judges in all the Courts, to the effect that, so far as Mr. *Farewell* was concerned, there was here no fraud. But it is difficult to conceive anything more clearly fraudulent than for the owners of property to arm a person, whom they knew to be about to endeavour to find others to take up a purchase, whether as a company or otherwise, with a document purporting to be an offer made by themselves as owners to sell at a fictitious price, at which price he is to propose to other people to take up and to accept that offer as if it were the real one. If that be not the real price which the owners of the property expect to get, and if they are parties to an arrangement that the intermediate agent, who is to induce others to accept the offer, is himself to put a considerable part of the nominal price into his own pocket, without any communication of the facts, the document is a dishonest and false document upon the face of it, representing no real transaction, but evidently representing a false transaction, only in order to deceive somebody. It was used to deceive, and so used with the knowledge of Mr. *Farewell* throughout, as much as with the knowledge of any other of the parties; he having, as he admits, in order to make the transaction one, placed his interest for the purpose of that offer, and for no other reason, in the hands of Mr. *Kemp*, and, through him, of Mr. *Hurd*. Mr. *Hurd* takes the offer to the company; the company are formed to take up the offer, but not without something to fortify Mr. *Hurd's* recommendation? And from whom does that come? From Mr. *Farewell*, whose own interest is not disclosed, who is known to be a person of special experience, and whose opinion has a special value in the province with regard to this particular description of property. He writes a letter, in which he says that, according to his judg-

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ment, it will be a good bargain at that price, and that if he had known that those properties or some of them had been to be sold at that price—that fictitious and false price so with his participation introduced into the document to deceive—he would himself have been willing to be a purchaser. He writes that to be shewn; and it is admitted, not indeed by him, but by one of the other witnesses, that the real price was purposely kept back, because it was known that the bargain would not have been obtained if that had been communicated. It is the language of Mr. *Kemp*, the person in whose hands Mr. *Farewell* placed himself and his own interests: "I did not tell them, nor did *Farewell* in my presence tell them, that the price was a sham price. I believe if the real price had been mentioned it would likely have defeated the object with which the offer was made. It is not likely it would have been revealed." And *Farewell* admits that he knew his opinion had a special value. He says, "I expected it"—the letter—"would be shewn, and that it would influence the opinion of such parties, as I was pretty generally known through that part of the country, and also known to have acquired knowledge respecting oil lands." He says, that he not only wrote that letter, but he personally communicated with a Mr. *Martin* and a Mr. *Neads*, recommending them to invest in the company, and repeated to one of them, *Martin*, what he had said in the letter. "I told him that if I had known a certain piece of the property had been in the market at the price offered, I would have purchased myself." And when *Brown* and *Sadler*, two gentlemen who are not shewn to know anything about the value of oil property themselves, go down to look at the land, an inspection on which so much reliance is placed,—when they come to look at the land *Farewell* contrives to meet them, and says this:—"I went to see them because I was interested in *Kemp's* succeeding in selling the lands, of which I gave him the option. I did not tell the parties that I was interested in any of the lands." But he talked to them, and helped to persuade them to be satisfied; and he says, distinctly, "I did not tell *Brown* and *Sadler* I was so interested. To all appearance I was a disinterested party to those that did not know it. I did not think it necessary to tell them." More abundant evidence of what a Court of Equity calls fraud it

would be very difficult to conceive, and their Lordships have no hesitation in saying that, in their judgment, the decree made by the Vice-Chancellor was perfectly and entirely right.

The sole difficulty which their Lordships have felt or now feel arises from the suggestion, which they do not think themselves at liberty altogether to disregard, though it ought not in their judgment to stop the appeal, that the company may now have been dissolved, and may not be in a position to make the necessary reconveyance. Undoubtedly, if they are not in that position, they have come here by the appeal asking for that to which they must know they are not entitled except upon conditions, which, if that be so, they cannot fulfil; and justice would not be done if provision were not made in the form of the Order for the possible contingency of their inability to make a reconveyance. What therefore their Lordships propose to recommend to Her Majesty is this:—To reverse the decree appealed from, and to substitute for it a decree to this effect: Declare that, subject to the right of the Respondents to a reconveyance of the lands in the pleadings mentioned, the Appellants are entitled to have the sale and the conveyance of such lands cancelled and rescinded; and that on such reconveyance being made to the satisfaction of the Court of Chancery for the province of *Ontario*, in the manner directed by the decree of the 15th of December, 1868, the Defendants do repay to the Plaintiffs the sum of $13,750, with interest from the date of the payment of the said purchase money to the date of such reconveyance, together with the costs of the suit to be taxed by the master, including all the costs in the several Courts below. But if such reconveyance be not made, then the bill ought to be dismissed as against the Defendants other than *Hurd*, without costs, so far as it asks relief beyond that given by the Court of Error and Appeal, in *Ontario*. Declare the Appellants entitled to the costs of this appeal if such reconveyance is made; but the Respondents entitled to the costs of the appeal if it be not made; and reserve any order as to such costs until after it shall be known whether the reconveyance is made or not, with liberty to apply, and then an affidavit of course can be made.

Credit must be given to the Respondents, as against the sum to be repaid by them if a reconveyance is made, for the amount paid

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under the Order appealed from; the sum carrying interest being reduced, by that payment, as at the date when it was made. If it should appear that, although a reconveyance can be made, some persons other than the company are now entitled to receive the money to be repaid, the form of the Order may be expressed so as to meet that case, by directing repayment to the Appellants, or to such other persons, if any, as are now entitled in their right. The rate of interest will be the same as that allowed by the decree of the 15th of December, 1868. Their Lordships will advise Her Majesty to remit the case to the Court below, with these declarations.

Solicitors for the Appellant: *Rashleigh & Smart.*
Solicitors for the Respondent: *A. Farewell; T. B. Nelson.*

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DAVID TORRANCE, THOMAS CRAMP, AND JOHN TORRANCE, TRADING UNDER THE NAME OR FIRM OF DAVID TORRANCE & CO. (DEFENDANTS) . . . . . } APPELLANTS;

AND

THE BANK OF BRITISH NORTH AMERICA (PLAINTIFFS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC (APPEAL SIDE) (1).

Renewal of Bill—Wrongful Appropriation of Cheque—Suretyship.

A. drew a bill on *B.*, which *B.* accepted. *C.* became the holder for value. Before due date it was agreed between *A.* and *C.* (*A.* assuring *C.* of *B.*'s concurrence) that the bill should be renewed; and *C.* gave to *A.* a cheque on *C.* for the amount of the bill, to the intent that *B.* should be placed in funds to meet the original bill, and should thereupon accept the renewed bill.

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, THE LORD JUSTICE MELLISH, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

A. sent the new bill to *B.* for acceptance, and also sent him the cheque, and *B.* knew the purposes for which both were sent.

B. cashed the cheque and paid the first bill, but refused to accept the second:—

Held, that *B.* had no right so to appropriate the cheque without accepting the bill:

Held, also, that the agreement between *A.* and *C.* did not release *B.* from his suretyship as acceptor of the first bill.

THIS was an appeal from a decision of the Court of Queen's Bench in *Canada*, by which they affirmed the judgment of the Court below there, in which it was held that the *Bank of British North America* were entitled to recover the sum of $10,000 and interest against Messrs. *Torrance & Co.*

The facts were set out in the declaration in the cause and in the findings of the jury, the substance of the defence having been a denial of all the material facts alleged in the declaration, and those facts in a great number of issues having been left to the jury and the jury having given their determination upon them. The question to be determined was, whether, having regard to the facts alleged in the declaration and the findings of the jury, a cause of action sufficiently appeared to entitle the *Bank of British North America* to recover this sum of money against Messrs. *Torrance & Co.*

The material facts as found were these:—The *Bank of British North America* were the holders for value of a bill of $10,000 which had been drawn by one *E. M. Yarwood* upon Messrs. *Torrance.* As found by the jury Messrs. *Torrance* were accommodation acceptors, and it was the duty of *Yarwood*, as between him and Messrs. *Torrance*, to provide for the bill when it became due at *Montreal* on the 18th of July. On the 15th of July *Yarwood* applied to the *Bank of British North America* to enable him to renew the bill, and he represented to the Bank that Messrs. *Torrance* would be willing to come into an agreement to renew the bill and to accept the renewed bill, and thereupon it was arranged between *Yarwood* and the Bank that a new bill should be drawn. A new bill was drawn on the 15th of July at three months' date. It was discounted by the Bank for *Yarwood*, and he at the same time, in order to provide funds to take up the bill which became due on the 18th of July, drew a cheque on the Bank in favour of

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Messrs. *Torrance* or order. That cheque the Bank accepted, payable at par at *Montreal;* this transaction taking place in *London.* They then delivered the cheque to *Yarwood,* and *Yarwood* forwarded the cheque to Messrs. *Torrance* with a letter, in which he stated: "I have drawn on you to-day at three months for $10,000, and enclose cheque on *B. B. N. America* for same amount to retire bill due on 18th inst." That letter, having been sent on the 15th of July with the cheque, arrived at *Montreal* on the morning of the 17th, and was there received by Messrs. *Torrance.* The Bank at the same time sent the renewed bill of the 15th of July to their manager at *Montreal* to obtain the acceptance of Messrs. *Torrance* to the renewed bill, and the Bank, on the morning of the 17th of July, left the renewed bill with Messrs. *Torrance* for their acceptance, it being the practice there that twenty-four hours are allowed before the drawee determines whether he will accept or not. That having been left for acceptance on the morning of the 17th of July, on the afternoon of the 17th of July, Messrs. *Torrance* presented the cheque for $10,000 at the Bank and received payment of it. Messrs. *Torrance,* the same day, gave notice to *Yarwood* that they refused to accept the renewed bill. There was a letter received the same day or the next day by *Cramp,* one of the partners in the firm of *Torrance & Co.,* and another letter subsequently which fully explained the whole transaction. Messrs. *Torrance* on the 18th duly paid the first bill. The material questions submitted to the jury were these:—"Fifth, did *Yarwood* request the Plaintiff to discount said draft of the 15th day of July, 1867, and allow him to draw a cheque for the full amount thereof, in order that he might therewith retire the said first-mentioned draft, and upon the representation and engagement by him that the Defendants would accept such new draft, and did the Plaintiff discount such new draft, and accept the said cheque, and certify it as being payable in cash at *Montreal,* on the faith of such representation, assurance, and undertaking, and deliver it to the said *E. M. Yarwood* for the purpose aforesaid?" And to that they replied: "Yes." The sixth question asked about the contents of the letter, and on that they said: "*Yarwood* remitted the cheque in his letter of the 15th of July, 1867, to cover the draft due the 18th instant, without explaining how he had obtained it." The eleventh ques-

tion was, "When they so presented the cheque for payment did they know, or had they reason to believe, that it represented the proceeds of the draft of the 15th of July, 1867, and that such draft was only discounted upon the faith that they would accept it?" The answer was, "We are of opinion that the Defendants had reason to believe that the cheque was the proceeds of the draft of the 15th of July, and that the said draft was discounted upon the faith that the Defendants would accept it."

Mr. *Benjamin*, Q.C., and Mr. *Cohen*, for the Appellants:—

Article 433 of the *Code of Procedure of Lower Canada* enacts that "whenever the verdict of the jury is upon matters of fact in accordance with the allegations of one of the parties, the Court may, notwithstanding such verdict, render judgment in favour of the other party if the allegations of the former party are not sufficient in law to sustain his pretensions." In this case the allegations of the Plaintiffs were not sufficient in law to sustain their pretensions, notwithstanding the verdict of the jury. The declaration was bad, and there was no cause of action. If the cheque was given to *Yarwood* without condition, we could not be bound.

As to the letter of the 18th of July, 1867, *Yarwood* never held out that he was acting as the agent of *Torrance*. The principal debtor and creditor made arrangements for the payment of the cheque while in *London*, which released the surety, though he was not aware of it, being at *Montreal*. If the creditor does anything by which the interest of the surety is affected, he is discharged. The Court in *Canada* says, "We will not go into the question whether the arrangement is or is not for the benefit of the surety. It is enough that the surety's position is altered."

The case of the *Bank of Ireland* v. *Archer* (1) is an exact counterpart of the present case.

[LORD JUSTICE MELLISH:—The promise there was to accept a bill not yet drawn.]

The case of *Key* v. *Cotesworth* (2) is in point. There is an estoppel by conduct: *Clarke* v. *Hart* (3). *Overend & Gurney's*

(1) 11 M. & W. 383. (2) 7 Ex. 595.
(3) 6 H. L. C. 631.

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Case (1), now under appeal to the House of Lords, decides that giving time to the surety is enough. In the notes to the case of *Rees* v. *Barrington* (*Tudor's* Leading Cases in Equity, p. 990, 4th ed.) all the cases are collected. An action would not lie for money had and received.

Sir *John B. Karslake*, Q.C., Mr. *Bompas*, and Mr. *Gillespie*, for the Respondents, were not called upon.

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The judgment of their Lordships was delivered by

LORD JUSTICE MELLISH:—[His Lordship, after stating the facts, proceeded as follows:—]

The real material question appears to be this:—Here is a bill of exchange drawn by *Yarwood* and accepted by Messrs. *Torrance*, of which the Bank are the holders. There is a proposal on the part of *Yarwood* to renew that bill. It is obvious that the bill could not be renewed except with the consent of three persons, namely, *Yarwood*, the Bank, and Messrs. *Torrance*; without the consent of Messrs. *Torrance* it was obvious that the bill could not be renewed. Then *Yarwood* and the Bank do agree to the renewal. Then the first question is, were Messrs. *Torrance* informed of those facts before they presented the cheque? Now, the jury have found as a fact that they had reason to believe them, which in their Lordships' opinion is the same thing as finding that they had knowledge of them, and therefore the result of it is that they had knowledge at the time when they presented the cheque that both the *Bank of British North America* and *Yarwood* were proposing to them to renew the bill of exchange, and they had knowledge that the cheque was forwarded to them on the assumption that they would assent to renew the bill of exchange, and with the view that for the purpose of enabling them to renew it they should have the cheque in order that they might obtain funds with which to pay the first bill.

Then, that being so, it appears to their Lordships most clearly that Messrs. *Torrance* were bound either to refuse or to accept the offer that was made to them. There was an offer made to them

(1) *Oriental Financial Corporation* v. *Overend, Gurney, & Co.*, Law Rep. 7 Ch. 142.

on behalf of both parties, on behalf of the *Bank of British North America*, and on behalf of *Yarwood*, that they would assent to renew the bill of exchange, and the cheque was given to them for the purpose of enabling them to carry out the renewal, if they assented to it. Therefore it appears that they were entitled to do one of two things, either to accept the offer that was made to them, and then they were bound to accept the bill of exchange, or else they were entitled to reject the offer that was made to them, and then if they did that they were bound to return the cheque. But, without giving any notice to the Bank that they accepted or refused the offer made to them, they took upon themselves to present the cheque and get it cashed. Now, it appears to their Lordships quite clearly that they were not entitled to take advantage of the agreement which had been made between *Yarwood* and the *Bank of British North America*, to which their assent was requested by cashing the cheque, unless they meant to bind themselves to act upon the agreement by accepting the bill of exchange. That being so, the consequence is that having acted upon it, and then afterwards having refused to accept the bill of exchange, they were bound to return the money which they had obtained on what the Bank must have understood to be a representation that they were going to accept the offer that was made to them, and going to accept the bill of exchange.

It does not appear to their Lordships that it is really necessary to say precisely what, if these facts had arisen in *England*, and it had become necessary to bring an action or to file a bill in *England*, would have been the precise remedy which would have been open to a person in *England*, whether it would have been an action for not accepting the bill of exchange, or an action for money had and received, or whether it would have been a bill in equity to recover back the moneys as having been obtained in bad faith, though if it were necessary to give an opinion upon that point, probably an action for money had and received would be the real remedy which would be open in the Courts here; that, however, is a technical question. The substantial and real question is that it was a matter of bad faith. I do not mean to make any remark against Messrs. *Torrance's* character at all, but, still, under the circumstances, a matter of bad faith; that when they got the cheque with full notice that the cheque was only given to them on

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the assumption that they would come into the arrangement of renewing the bill of exchange, it was a matter, as it appears to their Lordships, of bad faith for them to go and cash the cheque, being determined at the very same time, and having already made up their minds, that they would refuse to accept the bill of exchange.

Then it was contended by Mr. *Benjamin* in his very able argument, that Messrs. *Torrance's* position was altered by the arrangement, and that he, being a surety, was thereby discharged. Their Lordships are not able to see in what respect his position was altered. Certainly no time was given, because the first bill of exchange was not due until the 18th of July, and before the first bill was due the second bill must either have been accepted or rejected; and *Yarwood* was not discharged from any obligation which he had, because his only obligation was to provide the funds on the 18th of July. The argument seems to be that, having made this arrangement with the Bank, he, as a matter of fact, would not make any other efforts to obtain the funds. He was not discharged from obtaining them. His liabilities remained exactly what they were before, and if the bill had not been renewed, that is to say, if Messrs. *Torrance* did not accept the bill of exchange, no time would have been given, because he would have been instantly liable on both bills. Therefore their Lordships do not see that there is any ground for saying that Messrs. *Torrance* were discharged because their position as surety was altered or affected by what was done. It is very difficult to say how a surety's position can be altered, because the two parties say, "We offer to you to postpone your payment for three months if you like to accept it; you may either accept or reject it; but we offer to you, if you please, to postpone your liability to pay us for three months." It appears to their Lordships that that did no harm to the surety and could not have the effect of discharging him.

Some authorities were cited; there was the case of the *Bank of Ireland* v. *Archer* (1), the facts of which do, to a certain extent, resemble the facts in the present case; but, really, the only question that was decided in that case, the only question which was reserved by the Judge at the trial was, whether a promise to accept a foreign bill of exchange before the bill of exchange was drawn amounted to an acceptance. No question whatever was

(1) 11 M. & W. 383.

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raised respecting any right to recover under money had and received, or in any other way. The other case which was cited, *Key* v. *Cotesworth* (1), appears to their Lordships to have no bearing on the present case.

On the whole, their Lordships are of opinion that they must humbly advise Her Majesty that the judgment of the Court of Queen's Bench for the province of *Quebec* should be affirmed, and that this appeal should be dismissed, with costs.

Solicitors for the Appellants: *Thomas & Hollams.*
Solicitors for the Respondents: *Bischoff, Bompas, & Bischoff.*

C. P. HENDERSON & CO. . . . . APPELLANTS;

AND

THE COMPTOIR D'ESCOMPTE DE PARIS . RESPONDENTS.

J. C.*
1873
July 16.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG (2).

Bill of Lading, whether Negotiable or not—Omission in Bill of Lading of the words "or order or assigns"—Constructive Notice to Indorsee of a Bill of Lading of an Equity in the Goods.

Semble, a bill of lading, in which the words "or order or assigns" are omitted, is not a negotiable instrument.

Where goods have been delivered to the person to whom the bill of lading was made out, and they have then been delivered to indorsees of the bill of lading, so that the indorsees unite in themselves a legal and an equitable title to the goods, the omission of the words "or order or assigns" in the bill of lading is not sufficient to give the indorsees constructive notice of some equitable arrangement between the person to whom the bill of lading was made out and the consignors.

THIS was an appeal from a judgment of the Supreme Court of *Hong Kong*, dismissing with costs a bill filed in that Court by the Appellants, by which they prayed that it might be declared that all sums of money received by the Respondents in respect of fifty

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 7 Ex. 595.

(2) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

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bales of T. cloth shipped by the Appellants from *London* to *Hong Kong* by the ship *Ariel*, and consigned to Messrs. *Lyall, Still, & Co.* there for realisation, had been received by the Respondents in trust for the Appellants, and that the Respondents might be ordered to pay to the Appellants such sums of money and interest.

The Appellants were a firm of traders, carrying on business at *Manchester*. The Respondents were a *Paris* Bank, which also had a branch at *Hong Kong*.

In August, 1866, the Appellants commenced business relations with *George Lyall, Charles Frederick Still,* and *George Francis Maclean,* who carried on business in partnership in *London* under the style of *Geo. Lyall & C. F. Still,* and at *Hong Kong* under the style of *Lyall, Still, & Co.*

The terms on which such business was to be conducted are contained in the following letter to Messrs. *Geo. Lyall & C. F. Still,* of *London,* from the Appellants:—

"We shall be very happy to purchase goods for your account for shipment of your firms in *China* or *Japan,* drawing upon you either at nine months' date or at six months, renewable at three months for the invoice value. Our usual mode of conducting such transactions is as follows:—We ship the goods by such vessel as you shall name to the consignment of your house abroad, we handing you the bills of lading and invoices in triplicate both for transmission to your foreign house. The invoices will state that the proceeds of the shipments are to be remitted to you in first-class bank bills specially to meet your acceptance of our draft or any renewal thereof against the shipment, your house abroad to advise us of the remittances. Our commission for purchasing and drawing for cotton goods is 2 per cent. We charge no commission on woollen goods, the prices for the latter being quoted net."

In September, 1866, in pursuance of the agreement so come to between the Appellants and *George Lyall, C. F. Still,* and *G. F. Maclean,* the Appellants shipped fifty bales of T. cloth on board the ship *Ariel,* on account of the firm of *Geo. Lyall & C. F. Still,* under their bills of lading, which were as follows:—

"Shipped in good order and condition by *C. P. Henderson & Co.*

of *Manchester*, in and upon the good ship called *Ariel*, whereof *Keay* is master for this voyage, and now lying in the port of *London*, and bound for *Hong Kong*, fifty bales merchandise, one pattern parcel being marked and numbered as per margin, and are to be delivered in like good order and condition at the aforesaid port of *Hong Kong* (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted), unto Messrs. *Lyall, Still, & Co.*, of *Hong Kong*. Freight for the said goods having been paid here, ship lost or not lost, with primage and average accustomed. In witness whereof the master or purser of the ship or vessel hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the rest to stand void.

L. S. C. P. H.

51/100
50 Bales Merchandise
and one pattern parcel.

"Dated in *London* this day of September, 1866.

"*J. Keay.*

"Weight and contents unknown, and not accountable for leakage, breakage, rust, or damage by vermin."

From the bill of lading it appears that it was not intended to be transferred; but the fifty bales of cloth were to be delivered to the firm of *Lyall, Still, & Co.* only, and not to their order, the usual words "or order or assigns" being omitted.

The invoice for the bales was as follows:—

"Invoice of fifty bales T cloths shipped by *C. P. Henderson & Co.* per *Ariel*, from *London* to *Hong Kong*, and consigned to Messrs. *Lyall, Still, & Co.* there for realisation, the proceeds to be remitted to Messrs. *Geo. Lyall & C. F. Still, London*, in first-class bank bills specially to meet their acceptance of *C. P. Henderson & Co.'s* draft (or any renewal thereof) against this shipment, and bought for account and risk of Messrs. *Geo. Lyall & C. F. Still, London.*"

The bills of lading, together with the invoice, were received by the firm of *Lyall, Still, & Co.*, at *Hong Kong;* and on or about the 30th of November, 1866, and before the arrival of the ship *Ariel, Lyall, Still, & Co.* indorsed and delivered one of the bills of lading to the Respondents, for the purpose of obtaining the release of certain silk documents which had been previously deposited with the Respondents as collateral security for the payment at

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maturity, by *Lyall, Still, & Co.*, of two bills of exchange for the sums of $22,000 and $22,500 respectively, drawn by the firm of *Bower, Hanbury, & Co.*, of *Shanghai*, upon and accepted by *Lyall, Still, & Co.*, and indorsed to the Respondents. The silk documents, so released and given up in exchange for the security of the bill of lading, had been previously attached to the two bills of exchange. But at the maturity of the bills *Lyall, Still, & Co.* duly honoured and paid one of them, namely, the bill for $22,000; and it was then agreed between *Lyall, Still, & Co.* and the Respondents, that the other bill, namely, the bill for $22,500, should be met by an advance or loan from the Respondents to the firm of the amount thereof, the repayment whereof should be secured by a promissory note for the same, and also by the deposit in their hands of the bill of lading by way of collateral security; and in pursuance of this agreement *Lyall, Still, & Co.* obtained the loan of $22,500 from the Respondents, and paid off the bill of exchange for $22,500, and gave the Respondents a promissory note for $22,500, dated the 31st of December, 1866, and the bill of lading was allowed to remain in the hands of the Respondents as collateral security for the due payment of the same.

On the 22nd of December, 1866, *Lyall, Still, & Co.* executed and gave to the Respondents and to the *Chartered Bank of India, Australia, and China*, an assignment of the property comprised in the schedule thereunder written, which virtually included all their property, to secure the sum of $85,714·28 owing by them to the Respondents, and the sum of $50,000 owing by them to the *Chartered Bank of India, Australia, and China.*

The ship *Ariel* arrived at *Hong Kong* early in January, 1867, and the fifty bales of cloth were delivered to the Respondents on the 7th of January, 1867: the Respondents handed to *Lyall, Still, & Co.* the bill of lading, indorsed to the Respondents, receiving from them a receipt as follows:—

"*Hong Kong,*
"7th January, 1867.

"Received of the *Comptoir d'Escompte de Paris* (*Hong Kong* agency) bill of lading for (L. S. C. P. H.) $51/100, 50 bales, merchandise per *Ariel* valued at $7,625, proceeds of which we hereby engage

to pay to said bank as soon as collected on account of our promissory note for $22,500, dated 21st December, 1866, and interest $209/59. It is at the same time understood that the goods in question are stored for account and belong to the said bank until such proceeds have been paid.

"*Lyall, Still, & Co.*"

In accordance with the terms of this receipt, *Lyall, Still, & Co.* sold the fifty bales for $6,837·50, and remitted the proceeds of the sales of the bales, amounting to $6,837·50, to the Respondents, who applied the same in part satisfaction of the promissory note for $22,500.

When *Lyall, Still, & Co.* indorsed the bill of lading, they were unaware of its peculiarity in omitting the words "or order or assigns." And the Respondents alleged that the omission was not noticed by them.

The acceptance for the sum of £1,392 3*s.*, being the price of the fifty bales due to the Appellants, was dishonoured at maturity by *Geo. Lyall & C. F. Still*, and the Appellants had not been paid any part of this sum of £1,392 3*s.*

In March, 1867, the firm of *Lyall, Still, & Co.* stopped payment, but the Respondents alleged that, at the date of the indorsement and delivery of the bill of lading, they had no knowledge whatever of the firm being, if in fact they were, involved or in embarrassed circumstances.

On the 28th of March, 1867, the Respondents received from the Attorney of the Appellants a letter, claiming a special lien on the fifty bales of cloth and the proceeds thereof, in respect of unpaid purchase-money.

Previously to the receipt of this letter, the Respondents had no notice or knowledge whatever of any right, claim, or interest of the Appellants, or of the invoice, or of the agreement between the Appellants and the firm of *Geo. Lyall* and *C. F. Still* and the firm of *Lyall, Still, & Co.*, or of any other agreement in relation thereto, or of the existence of any special or other lien or right or claim of the Plaintiffs on the goods; and they dealt with *Lyall, Still, & Co.*, as being, as they appeared by the bill of lading to be, owners of the goods comprised therein.

On the 18th of May, 1869, the Appellants filed a bill of co-m

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plaint in the Supreme Court of *Hong Kong* against the Respondents as Defendants, praying that it might be declared that all sums of money received by the Respondents in respect of the bales of cloth had been received by them in trust for the Appellants, and that the Respondents might be ordered to pay them these moneys.

The cause was heard before the Acting Chief Justice of the Supreme Court of *Hong Kong* (the Hon. *Julian Pauncefote*) on the 7th of September, 1869, and the bill was dismissed with costs.

The ground for the decision was that the Respondents had acquired a legal title to the cloth; and that being so, they held it free from any trusts to which it was subject in the hands of the transferors, inasmuch as they took it without notice of the trusts; for it could not be maintained that the Respondents had constructive notice of any equitable interest of the Appellants in the cloth.

It was against this judgment that the appeal was now made.

Sir *Richard Baggallay*, Q.C., and Mr. *Dundas Gardiner*, for the Appellants:—

The bill of lading differs from an ordinary bill of lading, inasmuch as the words "or order or assigns" are omitted. Accordingly it was not negotiable. Thus, though it was indorsed to the Respondents, they never had anything more than an equitable interest in the goods. This was subject to the equity of the Appellants: *Rodger* v. *Comptoir d'Escompte de Paris* (1); *Rice* v. *Rice* (2). In any case the Respondents had constructive notice of the equity of the Appellants; the peculiarity of the bill of lading in omitting the words "or order or assigns" was sufficient to put the Respondents on inquiry as to the terms on which the goods were consigned to *Lyall, Still, & Co.*: *Wilson* v. *Hart* (3); *Kennedy* v. *Green* (4); *Le Neve* v. *Le Neve* (5); *Newson* v. *Thornton* (6). A breach of trust was committed by *Lyall, Still, & Co.* when they received the goods and delivered them to the Respondents.

Mr. *Jackson*, Q.C., and Mr. *Everitt* for the Respondents:—

The bill of lading was a negotiable instrument, notwithstanding

(1) Law Rep. 2 P. C. 393.
(2) 2 Drew. 73.
(3) Law Rep. 1 Ch 463.
(4) My. & K. 699.
(5) Amb. 436; White and Tudor's Leading Cases in Equity, vol. ii. p. 35.
(6) 6 East, 17.

its form. Even if it were not, the Respondents acquired by it an equitable title to the goods. And this was supplemented by the legal title on the delivery of the goods to them by *Lyall, Still, & Co.*, to whom the goods had been consigned. With regard to the alleged constructive notice, the peculiarity of the bill of lading is not sufficient to support any such contention: *Jones* v. *Smith* (1); *Hunter* v. *Walters* (2); *Pilcher* v. *Rawlins* (3). There was no breach of trust with respect to the goods; *Lyall, Still, & Co.* were either purchasers of the goods or were the agents of the Appellants.

Their Lordships' judgment was delivered by

SIR ROBERT P. COLLIER:—

The facts of this case, about which there is no dispute, may be very shortly stated. A firm in *Manchester*, Messrs. *Henderson & Co.*, purchased a quantity of goods, pledging their own credit, on behalf of Messrs. *Lyall, Still & Co.*, who were a firm in *London*, having a branch at *Hong Kong*. An arrangement was entered into by the parties, which is embodied in an invoice of these goods, which is as follows:—

"Invoice of 50 bales, T cloths, shipped by *C. P. Henderson & Co.*, per *Ariel*, from *London* to *Hong Kong*, and consigned to Messrs. *Lyall, Still, & Co.* there for realization, the proceeds to be remitted to Messrs. *Geo. Lyall & C. F. Still, London*, in first-class bank bills, specially to meet their acceptance of *C. P. Henderson & Co.'s* draft (or any renewal thereof) against the shipment, and bought for account and risk of Messrs. *George Lyall & C. F. Still, London.*"

Now, that was the arrangement entered into between the parties, and, as between the parties, their Lordships are of opinion that Messrs. *Lyall, Still, & Co.*, of *Hong Kong*, were under the obligation so to deal with the goods as to realize proceeds from their sale, and to transmit those proceeds to *Lyall, Still, & Co.*, in *London*, for the purpose indicated in this invoice, namely, of meeting their acceptances to Messrs. *Henderson & Co.* It appears that a bill of lading was made out, which is in the usual form, with this

(1) 1 Hare, 43. (2) Law Rep. 7 Ch. 75.
(3) Law Rep. 7 Ch. 259.

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difference, that the words "or order or assigns" are omitted. It has been argued that, notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority at *nisi prius* for that proposition; but, undoubtedly, the general view of the mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as "or order or assigns" ought to be in them. For the purposes of this case, in the view their Lordships take, it may be assumed that this bill of lading was not a negotiable instrument.

The bill of lading and the invoice were received by Messrs. *Lyall, Still, & Co.* at *Hong Kong* on the 13th of November, 1866, and soon after, it does not precisely appear when, this bill of lading was indorsed to the Defendants, who are bankers at *Hong Kong*. It was indorsed for this purpose: it was in order to enable Messrs. *Lyall, Still, & Co.*, of *Hong Kong*, to obtain back from the Defendants certain silk documents, as they are described, which were deposited with them to meet two acceptances, one for $22,000 and the other for $22,500. It appears that *Lyall, Still, & Co.* met the first bill; but when the second bill became due they borrowed a sum of money, sufficient to pay it, of the bankers, the Defendants, on giving their promissory note dated the 31st of December, 1866, and from that time this bill of lading remained with the bankers as a security for the repayment of that loan upon their promissory note. What next occurred, which is material, is stated very fairly in the case of the Appellants. They state that the ship *Ariel*, that is the ship carrying these goods, "arrived at *Hong Kong* early in January, 1867, and the said fifty bales were delivered to the Respondents on the 7th January, 1867; the Respondents handed to the said firm of *Lyall, Still, & Co.* the said bill of lading indorsed to the Respondents as aforesaid, receiving from them a receipt as follows:—

"'*Hong Kong*, 7th January, 1867.

"'Received of the *Comptoir d'Escompte de Paris* (*Hong Kong* agency) bill of lading for L. S. C. P. H. $51/100, 50 bales merchandise per *Ariel*, valued at $7625, proceeds of which we hereby engage to pay to the said bank as soon as collected on account of our promissory note for $22,500, dated 21st December" (it should be 31st December), "1866, and interest $209/59. It is at the same

time understood that the goods in question are stored for account and belong to the said bank until such proceeds have been paid.

"'*Lyall, Still, & Co.*'"

The case further states "that in accordance with the terms of the said receipt, the said firm of *Lyall, Still, & Co.* sold the said fifty bales for $6,837·50, and remitted the proceeds of the sales of the said bales, amounting to $6,837·50, to the Respondents, who applied the same in part satisfaction of the said promissory note for $22,500."

The view of their Lordships is this, that, assuming as they do that the bill of lading was not a negotiable instrument, its indorsement and delivery to the Bank gave them only an equitable right to the goods. But in their Lordships' view the transaction which took place subsequently amounted to a delivery of these goods to the Bank, after the goods had been landed and delivered in pursuance of the bill of lading, and when the bill of lading was *functus officio*. It appears to their Lordships that *Lyall, Still, & Co.*, having received these goods at *Hong Kong*, did deliver the possession of them to the Bank. It is true that the Bank did not take them to their own warehouses, probably because they had not warehouses convenient to hold them; and the Bank did not sell them themselves, probably because it would not be in the way of their business to sell them. They employed *Lyall, Still, & Co.* to sell them for the Bank; but, in their Lordships' opinion, in so selling them *Lyall, Still, & Co.* acted but as brokers to the Bank; and possession was in fact delivered to the Bank of the goods by *Lyall, Still, & Co.*, after *Lyall, Still, & Co.* at *Hong Kong* had the goods in their possession, and were able so to deliver them.

That being so, in their Lordships' opinion the Bank after that delivery united in themselves a legal and equitable title to the goods. If that be so, the only question which remains is, whether they had actual or constructive notice of the trust which, as between the original parties, *Henderson & Co.* and *Lyall, Still, & Co.*, in their Lordships' opinion existed?

It is conceded that there was no actual notice. The question remains whether there was constructive notice, and it should be—in order to make out the case of the Plaintiff—constructive notice at the time of the indorsement of the bill of lading. That constructive notice is attempted to be inferred in this way, and in this

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way only: It is said that the bill of lading was in an unusual form, omitting the words "*or order or assigns*," that the Bank ought to have taken notice of the bill of lading being in that unusual form, that they ought hence to have inferred that it was probable that some such equitable arrangement existed as that which is now proved, and that they ought to have made inquiries on the subject. It does not appear why the words "*or order or assigns*" were omitted. There is no evidence whatever that they were omitted intentionally with a view in any way to carry into effect the arrangement between the parties. It is admitted as a fact that *Lyall, Still, & Co.* at *Hong Kong*, when they indorsed the bill of lading to the Bank, were not aware of this omission. And their Lordships think that it may be assumed, from the conduct of the Bank and from other circumstances, that they did not notice it.

Their Lordships are further of opinion that the omission of these words, if noticed, was not a circumstance from which the peculiar arrangements subsisting between the Appellants and *Lyall, Still, & Co.* were necessarily to be inferred; nor even one which would necessarily excite the suspicions of a man of business of ordinary prudence, and put him on inquiry into the nature of those arrangements. They cannot, therefore, impute to the Respondents, either from their failure, if they did fail, to observe the omission, or from their failure, if they did observe it, to make further inquiry into the title of *Lyall, Still, & Co.*, what in the decided cases is sometimes called "wilful blindness," and sometimes "gross negligence." And they are of opinion that to hold that the mere absence of these words from the bill of lading, without more, was constructive notice to the Bank would be carrying the doctrine of constructive notice further than it has ever been carried—certainly much further than it has been the tendency of the Courts in recent cases to carry it.

Their Lordships are, therefore, of opinion that the decision of the Court below was right, and they will humbly advise Her Majesty that that decision be affirmed, and that this appeal be dismissed with costs.

Solicitors for the Appellants: Messrs. *Travers Smith & Co.*
Solicitors for the Respondents: Messrs. *Lyne & Holman.*

GILBERT BROWNING . . . . . APPELLANT;

AND

THE PROVINCIAL INSURANCE COMPANY OF CANADA . . . . . } RESPONDENTS.

J. C.*
1873
March 14, 15, 18; *April* 5.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (1).

Marine Insurance—Policy—Right of Undisclosed Principal to sue in his Agent's Name—Time of Occurrence of Loss of Cargo.

The rule that an undisclosed principal may sue and be sued upon mercantile contracts made by an agent in his own name, subject to any defences or equities which without notice may exist against the agent, is applicable to policies of marine insurance under the Canadian as well as under the English law.

L., an agent of *B.*, insured some goods belonging to *B.* that were being sent by ship from *Montreal* to *St. John's, Newfoundland.* The insurance company's agent issued to *L.* a "certificate of insurance," which stated that *L.* had insured the goods. It was the custom of the company to issue subsequently a policy stating that "*X. Y.*, as well in his own name as in the name of every person to whom the same shall appertain," had insured the goods. On a loss occurring, it was

Held (reversing the decision of the Court of Queen's Bench for *Lower Canada*), that the omission in the certificate of the words "as well in his own name, &c.," did not, either by the Canadian law or by the English law, preclude *B.* from suing the insurance company in his own name.

Where goods are insured for a voyage, the time of the loss occurring is not necessarily the time when the peril is encountered and the vessel driven ashore.

A ship with some flour as part of her cargo was seen in the *Gulf of St. Lawrence* on the 22nd of November, 1867, and nothing more was heard of her until May, 1868, when she was found ashore at *Anticosti*, all hands having been lost. On the 29th of November, 1867, a violent storm had commenced in the Gulf, and there was strong probability that the ship was capsized and driven ashore in that gale. Part of the flour insured was subsequently saved and sold by an agent of the insurance company. The action to recover on the policy was not brought until March, 1869. The policy

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

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containing a proviso that no action should be brought on it unless within a year after the loss was incurred, the insurance company contended that the assured was too late to bring an action:—

Held, that the loss was not in its inception total, and only became so when it was found that it was impossible to carry the flour to its destination, and that it was necessary to sell it. Consequently the assured was not precluded by lapse of time from bringing his action.

THIS was an appeal from a judgment of the Court of Queen's Bench for *Lower Canada* of the 9th of March, 1871, which affirmed on appeal a judgment of the Superior Court for *Lower Canada*, in the district of *Montreal*, of the 31st of March, 1870.

The Appellant was a baker of *St. John's, Newfoundland*. The Respondents were an insurance company of *Toronto*, who kept an agent at *Montreal*.

In November, 1867, the Appellant instructed *Joel Leduc*, a commission merchant of *Montreal*, who acted as his agent, to purchase a large quantity of flour and to ship it to him at *St. John's*. *Leduc* accordingly bought 1063 barrels of flour, of the value of $7000, paid for them himself, and shipped them on board his own ship, the *Babineau and Gaudry*, to be conveyed therein from *Montreal* to *St. John's*; and entered into an agreement with *Routh*, the agent of the Respondents at *Montreal*, for the insurance of the flour on the voyage. *Leduc* paid to *Routh* $280, the premium for the insurance; and the following "*certificate of insurance*" was then given by *Routh* to *Leduc*:—

"Provincial Insurance Company of *Canada*.

"Certificate of Cargo Insurance—No. 116.

"*Montreal*, 15th November, 1867.

"*Joel Leduc*, Esq., has this day effected an assurance to the extent of $7000 on the under-mentioned property from *Montreal* to *St. John's, Newfoundland*, and shipped in good order and well conditioned on board the schooner *Babineau and Gaudry*, whereof *E. Vigneau* is master this present voyage.

"Said insurance to be subject to all the forms, conditions, provisions, and exceptions contained in the policy of the company, copies of which are printed on the back hereof.

"*R. T. Routh*, agent.

"On 1063 barrels flour, amount, $7000; premium, $280."

Some of the conditions on the back of the certificate were these :—

"It is furthermore hereby expressly provided that no suit or action against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustained in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. . . .

"The interest of the insured in this policy is not assignable, unless by consent of this corporation manifested in writing, and in case of transfer or termination of the interest of the insured, either by sale or otherwise, without such consent the policy shall from thenceforth be void and of no effect."

It was the custom of the company to treat this as a provisional agreement, which would entitle the holder to a policy under the seal of the company. The forms of the policies issued by the company contained the following :—"*A. B.* as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain and in part or in all doth make insurance and cause to be insured, &c." But there was no evidence of any agreement on the part of the company to issue a policy under seal.

Under the bill of lading the flour was deliverable to the Appellant or his assigns. An invoice was sent by *Leduc* to the Appellant, in which the Appellant was debited with the price of the flour, commission, the expenses of cartage, cooperage, and wharfage, and the premium of insurance. Bills were drawn by *Leduc* on the Appellant for the amount, and they were subsequently duly accepted and paid.

The *Babineau and Gaudry* sailed with the flour on board on the 16th of November, 1867, from *Montreal* for *St. John's*. On the 20th of November she left *Quebec*, and was last seen in the *Gulf of St. Lawrence* about the 22nd of November, 1867.

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Nothing further was heard of her until the 16th of May, 1868, when news reached *Montreal* that she had been found, bottom up, on the island of *Anticosti*, and that all on board had probably been drowned. Notice was given to the Respondents, who thereupon sent their inspector to *Anticosti*. On his arrival in June, 1868, he took possession of the vessel, and disposed of 547 barrels of flour that had been saved, for $1796. After paying for salvage expenses, &c., the net proceeds amounted to $533.

In September, 1868, the Appellant made his claim on the Respondents for the sum of $7000, in respect of his loss.

There were some negotiations between the Appellant and the Respondents, and ultimately the Respondents refused to pay the claim, on the ground that in effecting the insurance, *Leduc* was acting, not for the Appellant, but on his own behalf to protect his own interest; and that the contract having been made in *Leduc's* name, the Appellant could not sue on it in his own name, and that, inasmuch as under the provisions of the "certificate of insurance" any action to recover a claim must be brought within a year of the occurrence of the loss, and the ship had in all probability been lost in November, 1867, it was too late for the Appellant to make any claim.

An action was thereupon commenced by the Appellant in the Superior Court of *Lower Canada*, to recover his claim from the Respondents. On the 9th of March, 1869, judgment was given for the Respondents by Mr. Justice *Badgley*. This judgment was confirmed on appeal to the Court of Queen's Bench for *Lower Canada*, where all the Judges held that the Appellant could not sue in his own name; moreover, Mr. Justice *Badgley* held that the action was not brought in time, although Chief Justice *Duval*, and Mr. Justice *Caron*, and Mr. Justice *Monk*, dissented from this view.

Mr. Justice *Badgley* said in his judgment:—

"By the certificate the insurance is with *Leduc*, and there is no proof to shew, as against the Respondents, that he effected it for Appellant or otherwise than in his own name. The certificate is a written document, which cannot be proved by the outside evidence to be otherwise than it is as between the contracting parties. It has never been assigned according to the last condition on the

back of the certificate, and by law the Appellant cannot be known as claimant except as assignee of the insured. The insurance is to *Leduc*, and no other in this case; not having been assigned to Appellant, he has no claim; the allegation of the declaration that the assurance was made to *Leduc* as agent and all whom it might concern, is not proved. Again, by the insurance certificate or receipt, it is conditioned that no suit or action shall be commenced against the insurers after the term of twelve months after the loss, and not, as argued, from the time when the vessel was last seen in the *St. Lawrence*, not from notice given of loss. The office common policy usually issued and produced in evidence, contains the same condition. No action after twelve months next after any loss or damage shall occur, and if suit be commenced after twelve months after such loss shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim attempted to be enforced. Upon the question of the loss, and the time of its occurrence, no possible better evidence can be afforded than the testimony of Mr. *Allan*, and of Captain *Basile Deroy*, whose vessel accompanied the *Babineau and Gaudry* in her course down the river and gulf, and was caught in the same storm, which, he says, wrecked the *Babineau and Gaudry* on *Anticosti*, at the end of November, 1867. The evidence of *McGregor* is, I think, conclusive that the vessel was driven ashore on the island, stern on, during the gale spoken of . . ."

Mr. *Watkin Williams*, Q.C., and Mr. *Kerr*, for the Appellant :—

In entering into the contract of insurance, *Leduc* was acting as the agent of the Appellant; and the general rule of law, that an undisclosed principal may take advantage of the contract entered into by his agent, applies to policies of marine insurance.

Though the agent cannot escape liability, the principal can sue: *Sims* v. *Bond* (1); *Higgins* v. *Senior* (2); *Humble* v. *Hunter* (3); *Ramazotti* v. *Bowring* (4); *Civil Code of Lower Canada*, Art. 2492. Moreover, the "certificate of insurance" entitled the holder to a policy, and the policies issued by the company were in the names of all persons interested.

(1) 5 B. & Ad. 389.
(2) 8 M. & W. 834.
(3) 12 Q. B. 310.
(4) 7 C. B. (N.S.) 851.

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The Appellant, therefore, was entitled to claim in his own name against the insurance company for the loss of the flour.

He is not precluded by lapse of time from bringing his action. The *onus* of proving the lapse of the year after the occurrence of the loss lies on the insurance company: *Wing* v. *Angrave* (1). It has not been proved at what time the ship was actually lost; and there is no improbability in the suggestion that the ship wintered safely on the north shore, and was lost in the spring of 1868, whilst striving to reach the port to which she was bound.

Moreover, the loss did not arise when the ship was wrecked; it arose only, when the loss of the ship became known, and it was found necessary to sell the flour. It was then that the right of action first arose.

There were some negotiations between the Appellant and the Respondent with reference to the claim, and in the midst of them a promise (without prejudice) to pay was made by the company. The delay in bringing the action was owing to these negotiations. The Respondents thereby waived the condition in the "certificate" as to time.

Sir *John Karslake*, Q.C., and Mr. *Bompas*, for the Respondents :—

In *Canada* the French law prevails, where no provision in the *Code* is applicable. There is nothing in the English law or the French law or the Canadian law, which shews that where an insurance has been made by an agent in his own name, the company can be sued in any other name than his. (See *Arnould* on Marine Insurance, vol. i., p. 223, 3rd ed.)

Moreover, there is no proof that *Leduc* was contracting otherwise than in his own name. The "certificate of insurance" indicates that the insurance was for himself; he had an insurable interest, having bought the flour with his own money: *Watson* v. *Swann* (2); *United States* v. *Parmele* (3).

The company never heard of the Appellant. If they had heard of him, they might have had good reason for refusing to contract with him. They probably would not have insured both principal and agent.

(1) 8 H. L. C. 183. (2) 11 C. B. (N.S.) 756.
(3) 1 Paine's U. S. Circ. Rep. 252.

Even if the certificate were a contract for a policy, the policy would be limited to the terms on the back of the certificate. This assurance was in the name of *Leduc*, and it could not vest in the Appellant without a transfer. (*Civil Code of Lower Canada*, Art. 2483.)

With regard to time, there is sufficient to shew that the loss of the ship took place early in December, 1867. And this was when the loss of the cargo also occurred. The loss occurs when the goods are lost, not when the fact becomes known to the owner; the sale of the part recovered has nothing to do with the time of the occurrence of the loss. The action was not brought until the 3rd of March, 1869. This was more than a year after the occurrence of the loss; and the provision in the "certificate of insurance" precluded the Appellant from bringing an action.

In the course of the arguments reference was also made to the following: *Browne* v. *Hare* (1); *Joyce* v. *Swann* (2); *Montreal Assurance Company* v. *McGillivray* (3); *Wolff* v. *Horncastle* (4); *Skinner* v. *Stocks* (5); *Bell* v. *Gilson* (6); *De Vignier* v. *Swanson* (7); *Stringer* v. *English and Scottish Marine Insurance Company* (8).

Their Lordships' judgment was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the Court of Queen's Bench for *Lower Canada*, affirming a judgment of the Superior Court for the province, which dismissed the Appellant's suit. The action was brought on a contract of insurance made with the Respondents on 1063 barrels of flour shipped in the schooner *Babineau and Gaudry*, on a voyage from *Montreal* to *St. John's, Newfoundland*. The contract was in the name of Mr. *Joel Leduc*, who had purchased and shipped the flour for the Appellant.

Two objections have been made to the Appellant's right to maintain the action, viz. (1.) that he cannot sue on the contract made in *Leduc's* name; and (2.) that under a clause of limitation

(1) 4 H. & N. 822.
(2) 17 C. B. (N.S.) 84.
(3) 13 Moo. P. C. 87.
(4) 1 B. & P. 316.
(5) 4 B. & Ald. 437.
(6) 1 B. & P. 345.
(7) 1 B. & P. 346.
(8) Law Rep. 5 Q. B. 599.

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contained in the contract his action is too late. The Judge of the Superior Court decided against the Appellant on the second objection. Upon the appeal in the Court of Queen's Bench, three Judges held that the action was brought in time, but that the Appellant could not sue in his own name; one Judge (Mr. Justice *Badgley*) alone upheld both objections.

The following general facts appeared on the evidence:—The Appellant, who carried on business as a baker at *St. John's*, had for some time employed Mr. *Leduc*, a commission merchant, to make purchases at *Montreal* of flour and ship it to *St. John's*. In the usual course of this agency, *Leduc*, in November, 1867, purchased 1063 barrels of flour, shipped it on board the *Babineau and Gaudry* (a vessel owned by himself) for *St. John's*, and insured it for $7000 with the Respondents in the form and manner which will be hereafter stated. The bill of lading stated the flour to be shipped by *Leduc*, deliverable to the Appellant or his assigns, and an invoice was sent by *Leduc* to the Appellant, debiting the latter with the price paid for the flour, commission, the expenses of cartage, cooperage, and wharfage, and the premium on the insurance. Bills were drawn by *Leduc* on the Appellant for the amount of this invoice, which were duly accepted and paid. The *Babineau and Gaudry* sailed from *Montreal* on the 16th of November, 1867, and left *Quebec* on her voyage down the *Gulf of St. Lawrence* on the 20th. She was last seen, proceeding on her voyage, on the 22nd, and no more was heard of her until the middle of May, 1868, when the news reached *Montreal* that she was ashore on the island of *Anticosti*, in the *Gulf of St. Lawrence*. An agent of the Respondents reached the island in the middle of June, and found the schooner lying bottom up. None of the crew appear to have been saved. A hole had been cut in the ship, out of which part of her cargo, including some of the Appellant's flour, had been taken, and some remained on board. The flour saved, or so much of it as could be recovered, viz. 547 barrels, was taken to *Gaspé* and sold by the Respondents' agent there for the gross price of $1796. An account was made out by the agent, which, after debiting the flour with the share of salvage expenses and other charges, shewed the net proceeds to be $533. The schooner was recovered and repaired.

It was contended, in support of the first objection, by the Respondents' counsel, that the insurance was in fact made by *Leduc* on his own behalf to protect his own interest, or, at all events, partly on his own behalf and partly on that of the Appellant. Their Lordships, however, feel little difficulty in coming to the conclusion, upon the evidence in the case, that the insurance was effected by *Leduc* as agent on behalf of the Appellant, his principal. *Leduc*, who was called as a witness by both parties, states that the Appellant, from the purchase of the flour up to its loss, was "*le seul propriétaire, et le seul qui y avait intérêt.*" Again, when examined by the Respondents, he says in English, "The insurance was in my name, though it was really the Plaintiff's." He, no doubt, also says that he made the insurance in his own name "in case of some accident, or that the Appellant should not have met his drafts;" but further explanation given by him shews that what he wanted to have, and considered he had, was a lien only on the policy which would end when his draughts were honoured. All the facts are consistent with what seems to be the effect of *Leduc's* evidence taken as a whole, viz. that the insurance was effected for the Appellant, and that *Leduc* had a lien upon the policy. Having paid for the flour with his own money, *Leduc* might, in the event of the Appellant's insolvency, have had the right, as a *quasi* vendor, to stop *in transitu*, but it nowhere appears that he kept any control over the bills of lading, under which the goods were deliverable to the Appellant or his assigns.

The result of the evidence is that the property in the flour passed to the Appellant, that it was shipped at his risk, insured at his cost, and that the insurance was effected by *Leduc* for him as the owner of it.

It was next urged that, if this were so, the Appellant could not sue on the contract effected in the name of his agent. This objection makes it necessary to consider the form of the present contract, and how it was made. The chief office of the Respondents is at *Toronto*, and their agent at *Montreal*, in taking insurances there, issues what are called "certificates of insurance" of a provisional kind, signed by the agent, upon which policies under the seal of the company are afterwards issued at *Toronto*.

The certificate in this case, dated on the 15th of November, 1867, commences as follows:—"*Joel Leduc*, Esq., has this day effected

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an insurance to the extent of $7000 on the under mentioned property from *Montreal* to *St. John's, Newfoundland,* shipped on board the *Babineau and Gaudry,* &c." The property is described as "1063 barrels flour." The certificate also states "the insurance to be subject to all the forms, conditions, provisions, and exceptions contained in the policy of the company, copies of which are printed on the back hereof." *Routh,* the agent of the Respondents at *Montreal,* proved the form of policy used by the Respondents, and it is set out in the record. This form runs thus:—"I, *A. B.*, as well in my own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain in part or in all," do make insurance, &c. These words are the same as those usually inserted in *Lloyd's* and other English policies.

It was contended that the certificate was a complete contract, and that as it did not contain these words, the Appellant could not sue upon it. Some authorities, principally American, were cited for this proposition, and *Arnould* on Marine Insurance (vol. i. p. 223, 3rd ed.) was also referred to. Mr. *Arnould* no doubt in this place states this to be so; but in another part of his book it is stated as a general rule that actions may be brought either by the broker whose name appears in the policy, or by the principal who instructed him to make it (vol. ii. p. 1013).

In *England,* policies are usually made in the name of the insurance broker, and it was long ago decided that the broker need not be described as agent to enable the principal to sue upon them (see *De Vignier* v. *Swanson*) (1). In a recent case, in which it was held that the plaintiff, under the circumstances there existing, could not maintain an action on such a policy, because the insurance could not be shewn to have been made on his behalf, the right of the person, who, in a case like the present, has been throughout the real principal, to sue on a policy made in the name of his agent was not doubted: *Watson* v. *Swann* (2).

By the law of *England,* speaking generally, an undisclosed principal may sue and be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities which without notice may exist against the agent: *Higgins* v.

(1) 1 Bos. & Pul. 346, n.

(2) 11 C. B. (N.S.) 756.

Senior (1); *Calder* v. *Dobell* (2). There seems no sufficient ground for making a distinction in the case of marine policies of insurance, especially when, having regard to the ordinary course of business, it must be known they are commonly made by agents. If, indeed, any particular interest were described in the policy to belong to the person named in it, an objection might arise founded on the rule that written contracts cannot be contradicted by parol evidence. This objection, however, does not occur in this case, where the insurance is general on the flour, and no interest is expressly described.

But if this were not the law in the case of a policy which did not contain the usual clause "as well in his own name, &c.," it is not denied that it would be so in the case of one which does; and their Lordships think that in this case the certificate ought to be construed with reference to the proved usage of the Respondents to treat such a document as provisional, entitling the assured to a policy in their common form, which would contain the above clause. This common form of the Respondents' policy clearly shews that in their contemplation the person named in the certificate might be contracting as an agent for another; and therefore, as against them, the contract ought to be interpreted as if the above clause were contained in it. It may be observed that the condition against assignment contained in the policy cannot affect the right of the Appellant, on whose behalf the contract was originally made.

The law of the Province does not appear to differ from that of *England* upon the question under discussion. The *Code of Lower Canada* allows policies to be made in the names of agents. Art. 2492 commences as follows:—"The policy of marine insurance contains the name of the assured or of his agent," thus giving the express sanction of the law to well-known mercantile usage.

It is right to observe that, although it was suggested at the Bar that there might be defences available against *Leduc*, if the action had been brought by him, none were stated which could have been established against him.

For the above reasons their Lordships think that the Judges of

(1) 8 M. & W. 834. (2) Law Rep. 6 C. P. 486.

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the Court of Queen's Bench were wrong in giving effect to the first objection.

The second objection, that the action was not brought in time, is founded upon the following clause indorsed on the certificate:— "It is furthermore hereby expressly provided that no suit or action against the said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustained in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

The action was brought on the 3rd of March, 1869, which it is said was more than twelve months after the loss. It appears that the *Babineau and Gaudry* left *Quebec* on the 20th of November, 1867, in company with a vessel, the *B. L. George*. The latter anchored at *Les Eboulements*, and whilst there the *Babineau and Gaudry* passed that place on her voyage down the *Gulf of St. Lawrence*. This was on the 22nd of November, and nothing was heard of her at *Montreal* from that day until the middle of May, 1868, when news came of her being ashore at *Anticosti*. It was proved that on the 29th of November a violent storm raged in the Gulf which continued until the 1st of December, and a strong probability is raised by the evidence that the schooner was capsized and driven on shore during that gale. But, although this probability is, in their Lordships' opinion, exceedingly strong, they do not find it necessary, in their view of the case, to determine whether the evidence affords a presumption of fact of such strength that the majority of the Court of Queen's Bench were wrong in refusing, as they did, to act upon it.

For, in this case, the insurance was not on the ship but on goods, and the point of time to be considered is not when the peril was encountered and the vessel driven ashore, but when the loss on the flour, for which indemnity is sought, accrued. It must often be uncertain whether the damage done to cargo by a peril

insured against will result in a partial or total loss; and the assured is not bound in such cases to make his election how to treat it, as soon as some incipient damage has occurred. It is obvious that, in many cases, there must be some lapse of time, greater or less according to circumstances, before the extent of the damage is developed, and that the assured must in the nature of things wait until it can be ascertained what the ultimate loss, for which he is entitled to claim indemnity, will really be. In the present case the disaster to the ship was not known either to the assured or the Respondents until May, 1868, and when the agent for the Respondents reached the ship, he found a hole had been cut in her side by the inhabitants of the island, through which they had taken out some of the flour. Part of the flour so taken out he recovered, and some barrels he took from the ship; the total quantity saved amounted to 547 barrels. The flour so saved existed in specie, and was sold as flour, realising the gross sum of $1796. It must be taken as against the Respondents, by whose agent the sale was made, that the flour saved could not have been taken on to *St. John's*, and that the sale of it was necessary.

It results from these facts that, a part only of the flour having perished, and more than one half having been saved, the loss was not in its inception total, and only became so when, by the course of events consequent upon the peril encountered, it was found to be impossible from the state of the flour to carry it to its destination, and that it was necessary to sell it. The sale under this necessity, at an intermediate port, caused a total loss of the flour to the assured—whether actual or constructive is immaterial as regards the present point; for not until that time were the facts constituting a total loss ascertained, and the right of the assured to claim indemnity for such a loss matured. The present suit was commenced within a year afterwards, and the condition, which must receive a reasonable interpretation, was therefore in their Lordships' opinion complied with. (See with reference to this subject *Roux* v. *Salvador* (1); *Farnworth* v. *Hyde* (2); *Stringer* v. *English and Scottish Marine Insurance Co.* (3); *Canada Code*, Art. 2521, 2522, 2541, 2544.)

(1) 3 Bing. (N.C.) 266. (2) 18 C. B. (N.S.) 835; Law Rep. 2 C. P. 204.
(3) Law Rep. 5 Q. B. 599.

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In the result their Lordships are of opinion that no valid objection can be opposed to the right of the Appellant to maintain the present action, to which, it may be observed, there is no defence whatever on the merits.

It appears from the English authorities above referred to, that the sale, supervening upon the existing state of things, would cause an actual, and not merely a constructive, loss of the flour. Whether this would be so under Art. 2522 of the *Canada Code* need not be considered, for no objection was taken for the want of notice of abandonment. Both parties at the Bar assumed there had been a total loss of one kind or the other, and no question having been made that the flour was not worth the sum insured, the Appellant is entitled to recover the full amount of the insurance, the Respondents taking the salvage, *i.e.* the proceeds of the sale.

Their Lordships will humbly advise Her Majesty that the judgments of the Courts in *Lower Canada* ought to be reversed, and that judgment in the action ought to be entered for the Appellant for the sum of $7000, with interest, according to the practice of the Courts below, and that the Appellant ought to be paid his costs in the Courts below by the Respondents. They must also pay the costs of this appeal.

Solicitor for the Appellant: Mr. *J. T. Simpson.*

Solicitors for the Respondents: Messrs. *Bischoff, Bompas, & Bischoff.*

THE CHAUDIÈRE GOLD MINING COMPANY OF BOSTON . . . . . } APPELLANTS;

AND

GEORGE DESBARATS, WILLIAM E. DESBARATS, AND DAME LOUISE POTHIER . } RESPONDENTS.

J. C.*
1873
June 11, 12;
July 29.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (1).

6 PC 109
112-9
120

Mortmain—A Trading Corporation cannot acquire or hold Lands in Lower Canada—Warranty—Warranty implied by Law excluded by express Warranty.

A corporation, whether merely trading or not, and whether foreign or domestic, is incapacitated from acquiring as well as from holding lands in *Lower Canada* without the permission of the Crown being first obtained.

D. sold mining property in *Lower Canada* to *F.* In the deed the property was described as having been assigned to *D.* by "original grantees of the Crown," but it appeared that patents from the Crown had not then been obtained; moreover by the deed *D.* expressly warranted and guaranteed *F.* against all mortgages, debts, &c. *F.* sold the property to a mining company of *Boston, United States;* and from the deed it might be implied that patents had been granted. The property was subsequently granted by the Crown to some one else, who evicted the company. The company brought an action in the Court of Queen's Bench for *Lower Canada* against *B.* as being liable as *arrière-garant* (remote warrantor). The action was dismissed, and on appeal to the Privy Council the judgment was upheld:—

Held, that, though a warranty of eviction is implied in contracts of sale, it must be inferred, from the insertion of a limited conventional warranty in the deed between *D.* and *F.*, that it was their intention to exclude the larger legal warranty. Thus, on an eviction by the assignee of the Crown, no action could be maintained by *F.* against *D.*, and consequently none by the company. Moreover the disability of the company to acquire lands precluded them from bringing an action on the warranty.

THIS was an appeal from a judgment of the Court of Queen's Bench for *Lower Canada* of the 10th of December, 1870, affirming a judgment rendered upon a demurrer by the Superior Court of *Lower Canada*, sitting at *Montreal*, in May, 1869, whereby an

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

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action, in which the Appellants were Plaintiffs and the Respondents Defendants, was dismissed with costs.

The Appellants were the *Chaudière Gold Mining Company* of *Boston*, in the State of *Massachusetts*, in the *United States* of *America*, a body politic and corporate, duly incorporated under the laws of the State of *Massachusetts*, for the purpose of and then actually carrying on the business of a mining company there, and at the township of *Watford*, in the county of *Dorchester*, and elsewhere, in the province of *Quebec*.

The Respondents were the legal representatives of *George Desbarats*, deceased.

By a deed of sale executed on the 24th of November, 1863, at the city of *Montreal*, by *George Desbarats* of the one part, and *James Foley* of the other part, and duly registered, *Desbarats*, in consideration of $20,000, bargained and sold, and bound and obliged himself, his heirs and assigns, to warrant, grant, guarantee, and defend against all mortgages, debts, and dowers whatsoever unto *James Foley*, accepting thereof for himself, his heirs and assigns, twenty-five lots of land in the township of *Watford*, *Lower Canada*, described in the deed as assigned to *Desbarats* by the respective original grantees from the Crown of the lots, with the exception of one lot described therein as assigned to him by the assignee of the original grantee, to hold the lots unto *Foley*, his heirs and assigns, in full and absolute property, subject only to the reservations and conditions that might be mentioned in the patents that might issue from the Crown.

Subsequently, by a deed of sale of the 25th of November, 1863, executed by *James Foley* of the first part, his wife, *Quintina Foley*, of the second part, and *John H. B. Lang*, president, authorized by and acting for the Appellants, of the third part, and duly registered, *James Foley*, in consideration of $200,000, bargained and sold the lots of land to the Appellants, their successors and assigns, for ever, subject nevertheless to the reservations, limitations, provisoes, and conditions expressed in the several original grants thereof from the Crown, and to settlement duties on the lots; *Quintina Foley* released her right of dower therein, and *James Foley* entered into a covenant with the Appellants for title to the lands, and for quiet possession thereof.

The Appellants alleged in their declaration that they purchased the lands in good faith as mining property, and that *Desbarats* and *Foley* respectively sold the same as mineral property at a price beyond the value of the land for ordinary purposes, and that both *Desbarats* and *Foley*, at the times of the respective sales, knew that they were not proprietors thereof, but sold the same in the expectation that *Desbarats* would secure the title thereto at the price of land for ordinary purposes, and thereby prevent the eviction to which they knew the vendee would otherwise be exposed, and being content to take the risk of so securing the title.

On the execution of the deed of sale of the 25th of November, 1863, the Appellants entered upon and took possession of the lands, and expended thereon $30,000 in improvements and mining operations to develop their resources.

The lands were Crown lands up to about the 5th of March, 1867, and neither *Desbarats* nor *Foley* ever got the title or patents thereto. On or about the 5th of March, 1867, the lands were granted by letters patent to *Thomas MacGreevy*, his heirs and assigns, in free and common socage, and *MacGreevy* took possession thereof, and the Appellants were evicted and obliged to give up the lands to him.

Desbarats died on the 12th of November, 1864, having by his will appointed his two sons, the Respondents, *George Desbarats* and *William E. Desbarats*, and his two daughters, his universal legatees. His widow, the Respondent Dame *Louise Pothier*, and *George Desbarats*, one of the Respondents, were appointed joint tutors of the two daughters, who were minors.

These universal legatees of *George Desbarats*, deceased, now represented him and his succession.

The Appellants prayed that the Respondents should be declared bound and liable to warrant, indemnify, and hold them harmless from and against the damages of $250,000, which they alleged that they had incurred.

The Appellants did not allege in their declaration that any licence from the Crown had ever been obtained by them to hold lands in *Lower Canada*.

The action was brought by the Appellants against the Respondents as representing their *arrière-garant*, or remote warrantor,

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under the 32nd section of the *Consolidated Statutes of Lower Canada*, c. 82, and Art. 126 of the *Code of Procedure for Lower Canada*, whereby "in case of real warranty (*en matière de garantie formelle*) the purchaser who is disturbed or evicted is not bound to call in first his immediate warrantor, but he may summon in warranty any more remote warrantor who may eventually be bound to intervene in the suit."

The Respondents demurred, and the cause came on to be heard on demurrer before the Superior Court of *Lower Canada*, sitting at *Montreal*, in April and May, 1869; and the action was dismissed with costs. On appeal the judgment was upheld by the Court of Queen's Bench for *Lower Canada*, three of the Justices being in favour of the judgment, and the Chief Justice and the fourth Justice dissenting. The ground for the decision was that the Appellants, being a corporation, were disqualified by the law of *Lower Canada* from purchasing lands in that country, and were accordingly precluded from bringing an action on the guaranty of lands which they had purchased; and farther, that they had shewn no legal right of direct recourse against the Respondents, as their alleged *arrière-garants*, through *Foley*, their immediate vendor, and the purchaser from *Desbarats*.

It was against this decision that the appeal was now brought.

Chief Justice *Duval* in his judgment said, *inter alia*, as follows:—

"Admitting that the company, as a foreign body corporate and politic, were under a legal disability to purchase lands in *Lower Canada*, it is difficult to comprehend by what process of reasoning *Desbarats* gets to the conclusion that he has a right to keep the company's $200,000 paid to him, and for which he has given them nothing. If the laws of *Canada* prohibit this purchase, then the sale is absolutely null and void—the deed a piece of waste paper, conferring no legal rights on the purchaser, except as to the restitution of the money paid. The law which is supposed to declare this disability creates no forfeiture—certainly not in favour of one who has participated in its violation, and who is therefore *particeps criminis*. Where, then, is the title of *Desbarats* to retain the money? For be it observed this action is brought to recover back the money paid. But is it true that the laws of *Canada* prohibit the contract entered into by the parties? The ground stated by

the Defendants is that the company is a *mainmorte*, and the French Edict, 1743, is referred to as creating this disability. The pretension that a few speculative characters, associated together for the purposes of making money by mining operations, are to be considered *gens de mainmorte* is certainly novel. No book of authority giving the definition of a *mainmorte* can be referred to in support of such a pretension. The very words of the declaration of the King of *France* above referred to exclude any such idea, and the spirit of the declaration is equally against it. Sound policy dictated the laws against *gens de mainmorte*; the same policy would encourage commercial enterprises which enrich the country and its inhabitants. Let us inquire into the character of this company; it will be found clearly defined in the Plaintiffs' declaration, and as the judgment maintains the demurrer which admits the truth of the allegations, the statement in the declaration must be taken as true. President *Troplong*, in the first volume of his able treatise, *Du Contrat de Société*, No. 3314 and following, has some very valuable remarks on this subject. I refer particularly to Nos. 329 to 333. To the English authorities, *Collyn*, *Bell*, *Bisset*, and others, it is not necessary to refer. It has been argued that the *Civil Code of Lower Canada* creates this disability. Article 366 is referred to. This article will be found to contain an exception, which is explained in Article 358, in these words:— Article 358: '*Les droits qu'une corporation peut exercer sont outre ceux qui lui sont spécialement conférés par son titre ou par les lois générales applicables à l'espèce, tous ceux qui lui sont nécessaires pour atteindre le but de sa destination: Ainsi elle peut acquérir, aliéner et posséder des biens, plaider, contracter, s'obliger et obliger les autres envers elle.*' In connection with this article is the 25th of the same code, in these words:—Article 25: '*L'étranger a droit d'acquérir et de transmettre, à titre gratuit ou onéreux, ainsi que par succession ou par testament, tous biens meubles ou immeubles dans le Bas-Canada, de la même manière que le peuvent faire les sujets Britanniques, nés ou naturalisés.*' See farther, Article 14 of the *Code of Civil Procedure of Lower Canada*, in these words:—'All foreign corporations or persons duly authorized under any foreign law to appear in judicial proceedings may do so before any Court in *Lower Canada*.' See also the *Consolidated Statutes of Lower Canada*,

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c. 91. In the third volume of the *Lower Canada* Reports, p. 76, will be found the judgment of the Superior Court of the 21st of February, 1853, dismissing the claims of the *Quebec Seminary* against the *Quebec Exchange* for an indemnity in favour of the *Seignior*, founded on the *prétention* that the *Quebec Exchange* was a *mainmorte*. The authorities in support of the decision will be found in the notes. The same question was decided in the case of *Kierzkowski* v. *Grand Trunk Railway Company of Canada* (1). It cannot escape remark that the law which denies the Plaintiffs' right of action to recover back the purchase-money paid, if correctly laid down by the present judgment, would be equally conclusive against the company if the action were brought to get possession of the land, so that *Desbarats* might retain both the land and the purchase-money. In the above remarks I omitted to note that a trading company, having purchased mining property, might convey it away, by sale or otherwise, at its pleasure. Of this right no doubt can be entertained, and it disposes of the objection raised on the ground of *inaliénabilité* attaching to real property in the hands of *gens de mainmorte*. As to the right of the company to sue the *arrière-garant*, see 1st *Troplong*, *Contrat de Vente*, No. 437, and the authorities there referred to."

Mr. Justice *Badgley* in his judgment said, *inter alia*, as follows:—

"Assuming the Appellants be the foreign corporation which they have qualified themselves to be, established and created in a foreign country by the law of that country only, it must be observed that, by the *Provincial Statute of Lower Canada*, *C.S.L.C.* c. 91, ss. 1, 2, foreign corporations are allowed the general comity right to sue and be sued in our provincial Courts of justice; but this permissive right to use those Courts does not confer upon such corporations the powers, capacities, and privileges granted by our local law to our own legally constituted corporations, nor relieve the foreign bodies from the declared disabilities of our law. The law of the foreign country, under which the foreign corporation is constituted, is a merely local law, and cannot extend or be extended beyond its own territory, and hence, when such corpora-

(1) 4 Lower Can. Jur. 86.

tions reach beyond the country which establishes them, and contract in a country foreign to that of its creation, *ex. gra.* this province, they are at once subject to our public law which regulates the extent of their contracting power, and becomes paramount over the foreign creative law, erecting them into bodies corporate, and over their foreign charter of incorporation. In these respects they, like all domestic corporations, are upon a different footing to natural persons. Corporations are creatures of limited powers, and are not and never can be citizens of the country; they are artificial creations, beings only in contemplation of law, and have no other attributes than those which the law confers upon them, or suffers them to enjoy or exercise, and hence, as the law of their establishing country has no extra-territorial operation, a foreign corporation, merely as such, cannot challenge as matter of right the privilege of dealing in a country not under the sovereignty which created it. Its being a trading corporation does not alter the principle applicable to corporations in general, although the Crown or the Provincial Legislature may confer corporate powers locally effective even upon foreign corporations, whilst it is competent for the Provincial Legislature to affix upon all corporations such conditions upon their powers as may be deemed expedient and politic, although such conditions are not imposed upon citizens, and from these conditions foreign corporations can of right claim no exemption. Instances of these prohibitive conditions are shewn in the public law forbidding banking business by corporations unless legally authorized, and such prohibition covers foreign as well as domestic corporations, and hence, therefore, the essential requisite of the authority of the Crown or of the Provincial Legislature to give such bodies a legal existence. Without these requisites, corporations have no legal recognition, no legal status as bodies politic in Courts of justice, and, fatal as these objections are to domestic corporations, they are doubly so to foreign ones, because the interdictions of our public law or public policy expressed by that law are not to be qualified by the laws or charter grants of a foreign country, and therefore become not only positive disqualifications against foreign corporations, but, moreover, are notice to the corporations themselves, and likewise to those who deal with them, as well within the province as without it, when they contravene the

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public interdictions. In such cases the contravention is fatal, and that objection fully applies to this action.

"Besides this general objection of public law, our special local law has been imported into this contention, and cannot be passed over unnoticed. The paramount authority of our local law over all corporations, and their erection in this province, is unquestionable, whether those corporations are of domestic or of foreign origin, as well as over the powers and capacities granted to them. As to the foreign bodies, this law applies absolutely, as well in respect of its foreign constituting law as of the charter powers by that law granted to those bodies, because our local Legislature has absolute power to forbid corporations to do certain acts or to make certain transactions altogether or under certain conditions, and to impose such disqualifications upon them as the Legislature may direct, and subjecting those bodies to be brought within the disqualifications of the law. These are legal transactions which need no citations from books to give them support. Assuming, then, the limited local existence and capacity of foreign corporations in this province, it seems plain that the statutory permission extended to them to sue and be sued in our Courts of justice, with reference to transactions in which they are interested, does not relieve them from the necessity of shewing their legal possession of the rights and privileges of our local law to give validity and effect to those transactions, which they use our Courts to enforce or defend; and so equally, on the other hand, must they shew that they suffer none of those disabilities and disqualifications which our law imposes upon all corporations, under certain circumstances. Now the 3rd chapter of our Civil Code, which was legislatively adopted and proclaimed and promulgated to be our municipal law, and as such declared to be in existence, declares the law applicable to corporations generally in this province, confers upon them express rights and privileges, and subjects them to special and positive disabilities. It is not necessary to refer to the former, but for the latter, the disabilities, the 364th Article of the Code enacts, 'Corporations are subject to particular disabilities, which either prevent or restrain them from exercising certain rights, powers, privileges, &c., which natural persons may enjoy and exercise; these disabilities arise either from their corporate character, or they are imposed by law.' The 365th

Article then declares the disabilities arising from the law, and amongst them those mentioned in the second subsection of the article namely, 'those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.' It is scarcely necessary to observe that the exceptions of this subarticle do not apply in this case. These provisions of the Code are positive enactments, and are not promulgated as new law, but are given as declaratory of the old law of the province, which expresses not alone the general law, but likewise the public policy of the province in regard to institutions of this nature; and it is common knowledge that no provincial Act or Charter of Incorporation by the Legislature of religious or secular bodies has been granted without the legislative permission being provided therein for their acquisition and alienation of real property. The royal permission of the old French law in force, or its equivalent, the modern legislative charter, is, by the Code, and authoritatively, declared to be the general law of the province for corporations in general, and without the royal or legislative permission all corporations are prohibited from acquiring such real property. Whatever doubts might have existed heretofore as to the prohibitive applications of the old law with reference to merely trading corporations, they have disappeared since the promulgation of the Code, which has *declared* those old law prohibitions to be and to have been our provincial law. The terms of the Code article are too plain for a doubtful construction, and in their generality embrace all corporations, secular, lay, or trading, and subject them all to the same disqualifications to acquire real property without the Royal or legislative permission first had and obtained.

"This general law of the country, as by the second subsection above, respecting both mortmainors and bodies corporate, is to be found originally in the Ordinance of Louis XV. of 1743, which was duly registered as municipal law in *Canada* at the time and has never been abrogated or repealed, and which the Code, by its statutory enactment, now assimilates with and applies to the law of corporations and bodies politic in general, extending beyond the religious and eleemosynary institutions of the Ordinance. The

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modern corporation did not exist, and was not referred to by the Ordinance, but our declaratory Code has extended the Ordinance disqualifications to the modern body politic corporation, trading or otherwise, and bound it in the politic prohibitive terms of the old law. The public policy of the Ordinance against publicly unsanctioned and unpermitted acquisitions of real property within the province, is the prevailing policy of our law, binding upon all corporations and strictly holding this corporation at the date of the execution of their indenture and deed of conveyance to them by *Foley*. Positive law as well as state policy prohibited the acquisition by the corporation of the lots of land set out in the indenture, and the corporation and their vendor could not *ex mero motu* of both or of either dispense with and set aside the statutory disqualifications of our state policy or public law. *Pothier, Traité des Personnes*, referring to the French Edit of 1749 for *France*, in this respect similar to that of 1743 above, from which the former was in part copied, says that the incapacity to acquire by *communautés* (morte-mainors) was absolute, and they could not acquire *à quelque titre que ce soit, soit à titre gratuit, soit à titre de commerce*, not even in payment of a debt, nor could notaries give their ministry to pass such deeds; power being reserved to the King alone to accord permission to acquire immoveables, &c., &c.

"It results from all these circumstances, that this foreign corporation is not known to the law as a natural person, that it cannot of right claim the exercise of the rights and privileges of natural persons, that it cannot acquire or hold immoveable property in this province in its own name without royal or legislative permission therefor first had and obtained, and could suffer no legal evictions from what it could neither acquire nor hold, against a positive prohibitory law, according with public policy, against such acquisition or tenure, and therefore could claim or demand no damages because of its own breach of the law and of public policy, and of its privation of illegally acquired provincial real property. Courts of justice may sustain a contract by a foreign corporation, but only when they can enforce it agreeably to the rules of the law which the Courts are bound to administer, and not in the peculiar manner of a foreign state, which is unknown to and of no force within the jurisdiction of the adjudging Court.

The objection of the demurrer is, therefore, also absolute against this corporation under the provisions of our local law.

"The remaining objection to be noticed is, that the corporation shews no legal right of direct recourse against the Respondents as the alleged *arrière-garants* of the corporation, through *Foley*, their immediate vendor, and purchaser from *Desbarats*, whom the Respondents represent. The judgment appealed from, after considering that the Appellants were a foreign corporation, by our provincial law under disability to acquire our provincial lands without sanction of the Crown or authority of the Legislature, and that the Appellants shew no right or title to the lands described in the declaration, considering therefore that they are not founded in their action of damages against the Respondents as representing their alleged *arrière-garants* the late *George Desbarats*, maintained the *défense au fonds en droit*, and declare valid, &c., &c., dismiss the action with costs. Upon this it must be observed, that the corporation claiming that the damage alleged to have been suffered by them from the enhanced value of the lots of land at the time when the corporation had been evicted from them, and which value they have estimated at $250,000 as already observed, does not rest upon any privity existing at any time directly between the parties to this suit, but resting specially in this point upon the article of the practice code, they take their direct recourse beyond their privity with *Foley* their vendor, against the Respondents as the *arrière-garants*. The article applies precisely and specifically *en matière de garantie formelle*, and in such matter only *arrière-garants* may be proceeded against directly; but here there could be no *garantie formelle*, no real rights acquired by the corporation, except those acquired against the prohibitions of public policy and disabilities of the law, whilst the terms of both the original and the second deeds of sale referred to in the declaration contain no such warranty. Without a legally acquired real property there can be no formal warranty, except by express stipulation to that effect, which would then be a personal contract by the guarantor enforceable directly against him, but not reaching over to his vendor without also a similar express stipulation in his favour by the latter. Now, none of all this appears in the declaration, and, instead, it shews a purchase by the corporation, the Appellants, from *Foley* in defiance

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of law and public policy, and therefore entirely and absolutely null and void in its legal effects against the Respondents without special warranty by the Respondents.

"No real right, no *garantie formelle* is involved in this cause. A speculative loss of an alleged enhanced value of the property by them purchased from *Foley* is claimed from the Respondents, and it is claimed as a personal loss to this foreign unauthorized corporation; but this is not the matter of the *garantie formelle* of the 126th Article upon which this action is made to rest. The legal disability above referred to is affixed upon this corporation, and their demand cannot be enforced by the local Courts, without setting aside the prohibitions of the law and of public policy, which these Courts are bound to administer and sustain. The recourse of the Appellants in some way may be against *Foley*, but is not against the Respondents, and their appeal should therefore be rejected."

The following laws were referred to in the case:—

"Edict of the King of *France* in 1743 (1).

"Art. I. *Voulons, conformément aux ordonnances rendues et aux règlements faits pour l'intérieur de notre royaume, qu'il ne puisse être fait dans nos colonies de l'Amérique, aucune fondation ou nouvel établissement de maisons ou communautés religieuses, hôpitaux, hospices, congrégations, confrairies, colléges ou autres corps et communautés ecclésiastiques ou laïques, si ce n'est en vertu de notre permission expresse portée par nos lettres patentes, enregistrées en nos Conseils Supérieurs des dites colonies, en la forme qui sera prescrite ci-après.*"

"Art. X. *Faisons défenses à toutes les communautés religieuses et autres gens de mainmorte établis dans nos dites colonies, d'acquérir ou de posséder aucun bien immeuble, maisons, habitations ou héritages situés aux dites colonies ou dans notre royaume, de quelque nature et qualité qu'ils puissent être, si ce n'est en vertu de notre permission expresse, portée par nos lettres patentes enregistrées en la forme prescrite ci-après dans nos dits Conseils Supérieurs, pour les biens situés aux colonies, et dans nos Cours de Parlement, pour les biens situés dans notre royaume; ce qui aura lieu, à quelque titre que les dites communautés ou gens de mainmorte prétendent faire l'acquisition des dits biens, soit par vente volontaire ou forcée, échange,*

(1) See Code de la Martinique (1807) vol. i. p. 474.

donation, cession ou transport, même en payement de ce qui leur seroit dû, et en général pour quelque cause gratuite ou onéreuse que ce puisse être. Voulons que la présente disposition soit observée nonobstant toutes clauses ou dispositions générales, qui auroient été insérées dans les lettres patentes ci-devant obtenues pour autoriser l'établissement des dites communautés, par lesquelles elles auroient été déclarées capables de posséder des biens fonds indistinctement."

"Art. XXI. *Tout le contenu en la présente Déclaration sera observé à peine de nullité de tous contrats et autres actes qui seroient faits sans avoir satisfait aux conditions et formalités qui y sont prescrites, même à peine d'être les dites communautés déchues de toutes demandes en restitution des sommes par elles constituées sur des particuliers, ou payées pour le prix des biens qu'elles acquerroient sans nos lettres de permission. Voulons en conséquence que les héritiers ou ayant cause de ceux à qui les dits biens appartenoient, même leurs enfants ou autres héritiers présomptifs de leur vivant, soient admis à y rentrer, nonobstant toute prescription et tous consentemens exprès ou tacites qui pourroient leur être opposés.*"

"Edict of the King of *France* in 1749 (1).

"Art. I. . . . . *Voulons qu'il ne puisse être fait aucun nouvel établissement de chapitres, colléges, séminaires, maisons ou communautés religieuses, même sous prétexte d'hospices, congrégations, confréries, hôpitaux, ou autres corps et communautés, soit ecclésiastiques, séculières ou régulières, soit laïques de quelque qualité qu'elles soient, ni pareillemant aucune nouvelle érection de chapelles, ou autres titres de bénéfices, dans toute l'étendue de notre royaume, terres et pays de notre obéissance, si ce n'est en vertu de notre permission expresse portée par nos lettres patentes.*" . . . .

"Art. IX. . . . . *Voulons que tous les actes et dispositions, qui pourroient avoir été faits en leur faveur, directement ou indirectement, par lesquels ils auroient acquis des biens de quelque nature que ce soit, à titre gratuit ou onéreux, soient déclarés nuls sans qu'il soit besoin d'obtenir des lettres de rescision contre lesdits actes. . . . .*"

"Art. XIV. *Faisons défenses à tous les gens de mainmorte d'acquérir, recevoir, ni posséder à l'avenir aucuns fonds de terre, maisons, droits réels, rentes foncières non rachetables, même des rentes constituées sur des particuliers, si ce n'est après avoir obtenu*

(1) Isambert's *Anciennes Lois Françaises*, vol. xxii. p. 227.

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nos lettres patentes pour parvenir à ladite acquisition et pour l'amortissement desdits biens." . . . .

"*Civil Code of Lower Canada.*

"Art. 358. The rights which a corporation may exercise, besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation; thus it may acquire, alienate, and possess property, sue and be sued, contract, incur obligations, and bind others in its favour."

"Art. 364. Corporations are subject to particular disabilities, which either prevent or restrain them from exercising certain rights, powers, privileges and functions, which natural persons may enjoy and exercise; these disabilities arise either from their corporate character, or they are imposed by law.

"Art. 366. The disabilities arising from the law are:

"1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

"3. Those which result from the same general laws, imposing for the alienation or hypothecation of immoveable property held in mortmain, or belonging to corporate bodies, particular formalities not required by the common law."

"Art. 1506. The warranty to which the seller is obliged in favour of the buyer is either legal or conventional. It has two objects:

"1. Eviction of the whole, or any part of the thing.

"2. The latent defects of the thing.

"Art. 1507. Legal warranty is implied by law in the contract of sale without stipulation. Nevertheless, the parties may by special agreement add to the obligations of legal warranty, or diminish its effect, or exclude it altogether.

"Art. 1508. The seller is obliged by law to warrant the buyer against eviction of the whole or any part of the thing sold, by

reason of the act of the former, or of any right existing at the time of the sale, and against incumbrances not declared and not apparent at the time of the sale.

"Art. 1509. Although it be stipulated that the seller is not obliged to any warranty, he is, nevertheless, obliged to a warranty against his personal acts. Any agreement to the contrary is null.

"Art. 1510. In like manner, when there is a stipulation excluding warranty, the seller, in case of eviction, is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction or had bought at his own risk."

Consolidated Statutes of Canada (1859), c. 63, s. 8.

"Any company incorporated under this Act, may in their corporate name purchase, hold, and convey any real or personal estate or moveable or immoveable property necessary to enable the company to carry on the operations mentioned in such statement or declaration; but no such company shall mortgage the same, or give any lien thereon.

Mr. *Eddis*, Q.C., Mr. *Watkin Williams*, Q.C., and Mr. *F. W. Gibbs*, for the Appellants:—

The main question in the Court of Queen's Bench was whether the corporation could acquire lands in *Lower Canada*. Now this is not an ordinary corporation, but is a trading corporation. Its whole object is to carry on the business of mining, and this could not be done without holding real estate in some way. Art. 358 of the *Civil Code* says that "the rights which a corporation may exercise, besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation." Thus the mining corporation is not affected by the disabilities declared by sect. 2 of Art. 366 of the *Civil Code* (1). Under the general law of *France* the company could hold lands; the Edict of 1743 does not refer to a commercial company, but only to religious corporations. Trading corporations are not *gens de mainmorte*, for their lands can be sold again; and it is not contrary to public policy that a trading corporation should be in possession of lands for a

(1) *Supra*, p. 290.

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time in order to develop their resources. See *Les Messieurs du Séminaire* v. *La Bourse de Québec* (1); *Kierzkowski* v. *Grand Junction Railway Company* (2). Moreover, c. 63, sect. 8, of the *Consolidated Statutes of Canada* (3) enables a body of proprietors on registration to become a company and to hold lands. Even if the company could not hold lands, they were not restricted from acquiring them. However, we submit that the right of action of the Appellants does not depend on their capacity to acquire lands in *Lower Canada;* and it was not necessary for them to allege any such capacity in their declaration. The action is a personal one for damages. The Respondents are estopped from asserting the disability of the Appellants to acquire lands. No doubt the Crown had a right to declare the lands forfeited; but the contract of the company to purchase the lands was merely voidable, and not void. With regard to the warranty, this question was not raised in the pleadings; a legal warranty against eviction is always implied in a contract of sale (Art. 1508 of *Civil Code* (4)), and this is not excluded by the insertion of the conventional warranty against mortgages, &c.

The fact of the corporation being a foreign one does not affect the question, as by Art. 25 of the *Civil Code of Lower Canada* aliens have a right to acquire and transmit moveable and immoveable property in *Lower Canada;* and by Art. 14 of the *Code of Civil Procedure of Lower Canada*, foreign corporations may appear in judicial proceedings in *Lower Canada.* See also *Dutch West India Company* v. *Moses* (5); *Newby* v. *Colt's Patent Firearms Company* (6); *American Mutual Life Insurance Company* v. *Owen* (7).

The case being decided upon demurrer, it ought to be assumed, until the contrary is shewn, that everything was done by the company to enable them to hold lands in *Lower Canada : Society for the Propagation of the Gospel* v. *Wheeler* (8).

Mr. *Benjamin*, Q.C., and Mr. *Westlake* for the Respondents :—

If the Appellants have obtained the permission of the Crown to

(1) 3 Low. Can. Rep. 76.
(2) 4 Low. Can. Jur. 86.
(3) *Supra*, p. 291.
(4) *Supra*, p. 290.
(5) 1 Str. 612.
(6) Law Rep. 7 Q. B. 293.
(7) 15 Gray's Mass. Rep. 491.
(8) 2 Gallison's American Rep. 105.

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acquire and hold lands, it ought to be alleged in the declaration. No action will lie against the Respondents; there was no warranty of title by *Desbarats*, and the law supplies a warranty against eviction only in cases where there is no express warranty; but the insertion of a warranty here shews that it was the intention of the parties to exclude the implied warranty: *Chambers* v. *Davidson* (1). (See *Civil Code of Lower Canada*, Arts. 1506-10.) The Appellants had no capacity to acquire lands in *Lower Canada*. After the Edict of 1743, corporations could acquire, but not hold, lands; after the Edict of 1749 they were prohibited from acquiring: *Pothier* pt. I. tit. 7. Moreover, by the *Civil Code*, Art. 366 (2), they are expressly prohibited from acquiring immoveable property. The prohibition was not confined to religious corporations, but extended to corporations of all kinds. That being so, the Appellants could not bring an action on a contract for the sale of lands.

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July 29.

Their Lordships' judgment was now delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the Court of Queen's Bench for *Lower Canada*, affirming a judgment of the Superior Court of the Province, which dismissed the Appellants' action. The action was brought by them, as vendees of mining property in *Lower Canada*, on an alleged warranty of title, not against *Foley*, their immediate vendor, but against the Respondents as the representatives of *Foley's* vendor, *George Desbarats*, who was, as they allege, liable as *arrière-garant* (remote warrantor), by virtue of Article 126 of the *Code of Civil Procedure*. The case was decided upon a demurrer to the declaration, and consequently upon the facts disclosed in it. The Appellants are there described as "*The Chaudière Gold Mining Company*, of *Boston*, in the State of *Massachusetts*, one of the *United States of America*, a body politic and corporate, duly incorporated under the laws of the said State of *Massachusetts*, for the purpose of and now actually carrying on the business of a mining company there, and at the township of *Watford*, in the county of *Dorchester*, and elsewhere, in the province of *Quebec*."

The declaration sets out a deed of sale of the 24th of Novem-

(1) Law Rep. 1 P. C. 296. (2) *Supra*, p. 290.

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ber, 1863, whereby, for the price of $20,000, *Desbarats* sold to *Foley* some lots of land which are stated to have been assigned to him by several persons described as "original grantees of the Crown;" but the deed at the same time discloses that patents from the Crown had not then been obtained. The declaration then sets out a deed of sale of the 25th of November, 1863, from *Foley* to the Appellants, whereby, for the price of $200,000, *Foley* sold to the Appellants the same lots of land, but by a description which not only does not state that the patents had not been issued, but from which it might be implied that they had been granted. *Desbarats'* deed of sale contains an express warranty of a limited kind. *Foley's* deed has a warranty in different terms. It is proposed to refer more particularly to these warranties hereafter. The declaration then alleges that the lands were Crown lands, which had not been granted to any person at the date of the deeds, and that neither *Desbarats* nor *Foley* had ever got "the titles or patents to the lands," and avers that the lots were afterwards granted by Letters Patent of the Queen to *McGreevy*, by whom the Appellants were evicted.

It was contended, on behalf of the Respondents, that, by the law of *Lower Canada*, corporations could not acquire land or an interest in it without the licence of the Crown, and, as a consequence, were not competent to maintain an action on a real warranty against a remote warrantor. It was further contended that, if this were not so, *Desbarats* had given an express warranty, which excluded the implied general warranty against eviction, and that this limited obligation gave no title to *Foley*, or to the Appellants as his vendees, to maintain this action.

For the Appellants it was answered that the disabling law did not apply to trading corporations, whether foreign or domestic; and further, that if it did embrace them, such corporations were not incapacitated from acquiring, but only from holding lands, and that in either view their action was maintainable; and it was denied on their part that the ordinary legal warranty against eviction arising upon contracts of sale was excluded by the terms of *Desbarats'* deed.

In the view their Lordships take of this case, it will not be necessary for them to determine the status and rights of foreign

corporations in *Lower Canada*, or to what extent, if at all, they differ from corporations established in the colony. The law of the province deals liberally with foreigners. By the *Civil Code*, Art. 25, aliens have the right to acquire and transmit moveable and immoveable property in the same manner as British-born or naturalised subjects; and by the *Code of Civil Procedure*, Art. 14, foreign corporations may appear in all judicial proceedings in the colony. Whatever may be the effect of these Articles, it is sufficient to say that the Appellants cannot be in a higher or better position than a colonial corporation would be; and their Lordships, therefore, without further reference to the above distinction, will proceed to consider the principal question discussed by the Judges in the Courts below, viz. the capacity of mining or trading corporations to acquire lands in the colony.

By the old law of *France* and her colony, before the Edicts of *Louis* XV., issued in 1743 in the colony, and in 1749 in *France*, corporations might acquire lands, but could not hold them without licence from the Crown, if required to give them up. But these Edicts, which appear to be substantially to the same effect, incapacitated corporate bodies from acquiring as well as holding lands.

This distinction is very clearly stated by *Pothier*, "*Traité des Personnes*," Tit. 7, Art. 1.

He says: "*Dès avant l'Edit de* 1749, *les communautés n'étoient pas à la vérité incapables d'acquérir des héritages; mais si elles pouvoient les acquérir, elles n'étoient pas en droit de les retenir toujours. Elles pouvoient être obligées de vuider leurs mains de ces héritages, soit par les seigneurs, de qui les héritages acquis par elles relevoient; soit par le Procureur du Roi, à moins qu'elles n'eussent obtenu du Roi des lettres d'amortissement, qui les rendissent capables de posséder et retenir ces héritages, en indemnisant les seigneurs.*"

He then explains that the right of the King to oblige corporations "*à vuider leurs mains de ces héritages*" was founded on reasons of public policy, and that of the seigneurs on their title to receive profits upon mutation of the lands on death and otherwise. *Pothier* further says: "*L'Edit de* 1749 *a rendu les communautés absolument incapables d'acquérir aucuns héritages, comme fonds de terre . . . . Les choses qu'il est défendu par cette loi*

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d'acquérir, ne peuvent être par elles acquises à quelque titre que ce soit, soit à titre gratuit, soit à titre de commerce," . . . .

The prohibitory force which the learned author ascribes to the Edict seems to be amply justified by the terms of it.

It was not denied by the counsel for the Appellants that *Pothier* had properly declared the effect of the Edict upon the corporations with which it dealt; but they contended that these were religious and eleemosynary bodies only, and that modern trading corporations were not within its scope. There can be little doubt that the main object of the Edicts was to discourage the excessive endowment of religious houses, but the Edict of 1743 has words large enough to include secular bodies also. Art. 1, after enumerating particular corporations, has the general description, "*autres corps et communautés ecclésiastiques ou laïques.*" And the prohibition to acquire lands contained in Art. 10 is directed against "*autres gens de mainmorte*" as well as religious bodies.

It was argued that trading corporations could not be deemed "*gens de mainmorte,*" because their lands were not withdrawn from commerce, and were alienable. But the withdrawal of lands from commerce was only one, and not the main, reason of the law of mortmain, which was founded, as plainly appears from *Pothier*, not only on considerations of public policy, but on the loss to the lords of their seignorial rights.

Their Lordships, however, cannot consider it to be their duty, at this day, to construe the language of the Edict as alone containing the law of *Canada* on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the *Code*, which is free from ambiguity. Tit. XI. of the First Book of the *Code*, which treats of "Corporations," in terms includes every kind. Art. 364 states: "Corporations are subject to particular disabilities, which either prevent or restrain them from exercising certain rights, powers, privileges, and functions, which natural persons may enjoy and exercise; these disabilities arise either from their corporate character, or they are imposed by law." The disabilities arising from the law are stated in Art. 366, as follows:— "1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs. 2. Those comprised in the general laws of the country re-

specting mortmains and bodies corporate, prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value." The article refers, not to the Edict, but to the general laws of the country respecting mortmain, and their Lordships think that it declares the disabilities which attach by the general law of mortmain to all corporations without distinction.

It may here be observed that this view of the *Code* is affirmed by the majority of the Judges in the Court of Queen's Bench in the present case, and is not denied by the two dissenting Judges. Mr. Justice *Badgley* refers to the *Code* in his judgment as follows:—

"Whatever doubts might have existed heretofore as to the prohibitive application of the old law with reference to merely trading corporations, they have disappeared since the promulgation of the *Code*, which has declared those old law prohibitions to be and to have been our provincial law. The terms of the *Code* Article are too plain for a doubtful construction, and in their generality embrace all corporations (secular, lay, or trading) and subject them all to the same disqualifications to acquire real property, without the Royal or legislative permission first had and obtained."

These observations on the declaratory force of the *Code* are entitled to great weight from the fact that Mr. Justice *Badgley* was one of the Judges who, in a case relied on by the Appellants, *Kierzkowski* v. *Grand Junction Railway Company* (1), expressed an opinion that trading corporations were not "*gens de main morte.*" In that case, however, the railway company had legislative powers to purchase lands, and the question arose incidentally in an action for seignorial dues. Whatever may be the worth of the opinions expressed in that case, the higher authority of the *Code* must now prevail.

Their Lordships, for these reasons, think the Court of Queen's Bench was right in holding that the Appellants were incapable, without the licence of the Crown, which it is not averred they possessed, to acquire any title to the lands sold to them by *Foley*.

(1) 4 Low. Can. Jur. 86.

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But before considering the effect of this disability on their right to maintain the present action, it will be convenient to advert to the nature and extent of the warranty upon the sale by *Desbarats* to *Foley*, of which the Appellants are seeking to avail themselves.

By the law of *France* prevailing in the colony a warranty against eviction is implied in contracts of sale, but it is permitted to derogate from it by contract. *Pothier* says: "*Le droit commun des contrats de vente qui oblige le vendeur envers l'acheteur à la garantie de la chose vendue, ne concernant qu'un intérêt particulier des acheteurs, il est permis aux parties de déroger à ce droit par conventions particulières*" (1). The author then gives instances of conventions having this effect, one of them being, "*Celle par laquelle le vendeur stipule qu'il ne sera garant que de ses faits.*"

The *Code of Lower Canada*, in effect, embodies this law. Art. 1506 declares that the warranty, to which the seller is obliged in favour of the buyer, is either legal or conventional. Legal warranty is defined in Art. 1508, and includes warranty against eviction by reason of any right existing at the time of sale. Arts. 1507, 1509 and 1510, declare the manner in which this warranty may be excluded or diminished, as follows: Art. 1507: "Legal warranty is implied by law in the contracts of sale without stipulation. Nevertheless, parties may, by special agreement, add to the obligations of legal warranty, or diminish its effect, or exclude it altogether." Art. 1509: "Although it be stipulated that the seller is not obliged to any warranty, he is, nevertheless, obliged to a warranty against his personal acts. Any agreement to the contrary is null." Art. 1510: "In like manner when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk."

By the deed of sale *Desbarats* expressly bound himself and his heirs to warrant and guarantee *Foley* against all mortgages, debts, and dowers whatever. There is no other express warranty. The terms of transfer are limited to the rights and interests *Desbarats* had or could demand in the subject-matter of the sale. It is evident that the eviction by the Crown is not a breach of the express

(1) Pothier, *Traité du Contrat de Vente*, Part II. chap. 1, s. 2, Art. 7.

warranty given by *Desbarats*. His liability for this eviction must therefore be founded, if it exists at all, on legal warranty. It was insisted on the part of the Respondents that the legal warranty was excluded by the conventional warranty, upon the ordinary rule of construction, *expressum facit cessare tacitum*.

It is true that the conventional warranty of *Desbarats* does not contain the word "*only*," or other equivalent expression; but it seems to be a reasonable, if not a necessary, implication from the insertion of a limited conventional warranty, that it was the intention of the parties to exclude the larger legal one, and this implication is strengthened by the peculiar form of the conveyance and by the disclosure in the deed of the fact that patents had not then been granted by the Crown—a disclosure which was not made in the conveyance by *Foley* on his sale to the Appellants, for a price which was an enormous increase on that he had paid to *Desbarats*.

There appears, then, to their Lordships to be strong ground for holding that the legal warranty was excluded on *Desbarat's* sale; and that no action could have been maintained by *Foley* against *Desbarats* upon an eviction by the Crown; and if this is so, none can be maintainable against him by the Appellants for such eviction, even if they had been under no disability; because, in suing *Desbarats* as a remote warrantor, they can have no greater remedy against him than their immediate warrantor, *Foley*, to whose rights they are in effect subrogated by the operation of Article 126 of the *Code of Civil Procedure*.

It is not, however, necessary to rest the decision on this ground, because, assuming the legal warranty not to have been excluded on the sale by *Desbarats* to *Foley*, their Lordships think that the legal disability to purchase lands under which the Appellants are placed prevented them from acquiring the right to resort to it. Such a right can only spring from a valid sale, and the sale from *Foley* to them being invalid, by reason of their incapacity to purchase, the consequential right to sue *Desbarats* on a legal warranty could never arise. Whatever may be the case, as between *Foley* and the Appellants, it is evident that *Desbarats*, who was not a party to that sale, is not estopped from asserting its invalidity.

The Chief Justice of the Court of Queen's Bench was of opinion that, although the Appellants might be under a legal disability to

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purchase, the action was maintainable against *Desbarats* for the price as upon a failure of consideration. But this opinion appears to have been given upon the erroneous assumption that *Desbarats* had received the price paid on the sale by *Foley*, viz., $200,000, from the Appellants. The right to restitution of the price is independent of warranty, and can be enforced, as it appears to their Lordships, only between the immediate parties to a sale. Art. 1510 of the *Code* declares this right:—"In like manner, when there is a stipulation excluding warranty, the seller in the case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk." By the terms of this Article it is only when warranty is excluded that this obligation to return the purchase-money as between the immediate parties to the sale arises; and it cannot, therefore, be within Art. 126 of the *Code of Civil Procedure*, which is confined to the case of warranties.

Their Lordships in deciding this appeal are dealing only with the action brought under this Article against *Desbarats*, and not with the rights (if any) which the Appellants may have against their immediate vendor, *Foley*, either on his express engagements or for restitution of the price paid to him.

One other point remains to be noticed, viz. the contention on the part of the Appellants that, although it is not averred in the declaration that the licence of the Crown had been obtained, the grant ought, upon demurrer, to be assumed until the contrary was shewn by plea. Their Lordships cannot agree in this view. On the face of the declaration the Appellants were incorporated by the law of a foreign state, and were, according to what has been already decided, under a legal disability by the general law to acquire lands in *Canada*. Assuming that this disability might have been removed by a licence from the Crown, it appears to their Lordships that it was for the Appellants to shew it, since this licence was essential to confer on them the legal capacity to purchase and to maintain the action. The grant also, if obtained, would be a fact peculiarly within their own knowledge, and ought, according to a reasonable rule of pleading, to have been averred by them. This pleading point, it may be observed, is entirely beside the substance of the case; for there can be no doubt that, if a

licence had been really granted, the Appellants would have applied and been allowed to amend their declaration and aver its existence.

In the result, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss this appeal with costs.

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Solicitors for the Appellants: *Wilde, Wilde, Berger, & Moore.*
Solicitors for the Respondents: *Ashurst, Morris, & Co.*

MESSRS. ANDERSON, ANDERSON, & CO., OF BILLITER COURT, FENCHURCH STREET, IN THE CITY OF LONDON . . . . . } APPELLANTS;

AND

THE OWNERS OF THE SHIP OR VESSEL "SAN ROMAN" . . . . . } RESPONDENTS.

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THE "SAN ROMAN."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND (1).

Delay in Voyage—Apprehension of Capture—Charterparty.

An apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, will justify delay in the prosecution of a voyage; and a ship is not answerable in a suit under s. 6 of the *Admiralty Court Act*, 1861, for damage to cargo caused by such delay.

THIS was an appeal from an interlocutory decree or sentence of the Judge of the High Court of Admiralty of *England* in a cause lately pending in that Court, promoted and brought by the Appellants against the North German vessel *San Roman*,

* *Present*:—THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, THE LORD JUSTICE MELLISH, and SIR MONTAGUE E. SMITH.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

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under the 6th section of the *Admiralty Court Act*, 1861 (1), for the recovery of damages in respect of loss suffered by the Appellants as owners of a cargo of spars laden on board the *San Roman*.

The facts of the case were shortly as follows:—

On the 13th of February, 1869, a charterparty was entered into between Messrs. *Bilbe & Co.*, of *London*, and the Respondents, under which it was agreed that the *San Roman*, a North German vessel of 1335 tons register, then at *Antwerp*, should, after discharging an outward cargo at *Japan* for owners' benefit, with all convenient speed sail and proceed to a safe loading place in *Puget Sound* or *Burrow's Inlet* as ordered, in *Royal Roads*, off *Victoria*, in *Vancouver's Island*, or so near thereunto as she might safely get, and there load as supplied by the agents of the charterers a full and complete cargo of spars which the charterers bound themselves to supply, and being so loaded should therewith proceed as the charterer's agents might order on signing bills of lading to a port of discharge direct, or to *Queenstown* or *Falmouth* for orders for a port of discharge, and there deliver the cargo on payment of freight as therein provided. The master to sign bills of lading for the cargo as required by the charterers or their agents without prejudice to the charterparty.

The charterparty contained the following clause, namely:—

"The act of God, the Queen's enemies, restraints of princes and rulers, frost, fire, and all and every other danger and accidents of the seas, river, and navigation, of what nature and kind soever during the said voyage, always mutually excepted."

Pursuant to the terms of the charterparty, the *San Roman* proceeded to *Port Ludlow*, and there, on the 21st of May, 1870, Messrs. *Sproat & Co.* caused to be shipped on board her a cargo of spars and other timber goods, and *R. Martens*, her then master,

(1) The 6th section of the *Admiralty Court Act*, 1861, gives the High Court of Admiralty jurisdiction over claims by the owner, consignee, or assignee of a bill of lading of goods carried in any ship into any port in *England* or *Wales*, for damage done to such goods by the negligence, or misconduct, or breach of duty or of contract of the owner, master, or crew of such ship, unless such owner is domiciled in *England* or *Wales*, thus allowing an action against the ship or proceeding in rem.

signed and delivered a bill of lading for the same in the following form:—

"Shipped in good order and condition by *Sproat & Co.*, as agents, on board the ship called the *San Roman*, whereof *R. Martens* is master, now lying at *Port Ludlow*, bound for *Queenstown* or *Falmouth* for orders for a port of discharge.

"Forty-eight	(48) spars.
"Four hundred and twenty-seven .	(427) yards.
"Twenty-nine	(29) topmasts.
"Seventy-one	(71) masts.
"Six	(6) bowsprits.

"One thousand three hundred and twelve (1312) pieces lumber, containing 110,314 feet, as per specification indorsed hereon, and are to be delivered in like order and condition at a port within the limits mentioned in charterparty, as may be ordered at *Queenstown* or *Falmouth* (the dangers of the seas only excepted), unto Messrs. *Anderson, Anderson, & Co.*, or their assigns, he or they paying freight for the said cargo, as per charterparty, with average accustomed, as per charterparty.

"In witness whereof the master of the said vessel hath affirmed to the three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

"Dated at *Port Ludlow*, the 21st day of May, 1870.

"*R. Martens.*"

Messrs. *Sproat & Co.*, in shipping such cargo, acted as agents both for the said firm of *Thomas Bilbe & Co.* and the Appellants, and it was admitted by the Appellants that the members of the firm of *Thomas Bilbe & Co.* and the Appellants' firm were nearly identical.

The bill of lading was subsequently delivered by the said Messrs. *Sproat & Co.* to the Appellants.

The Appellants by their petition alleged that the *San Roman* sailed from *Port Ludlow* with the said cargo on board, but that her master, in violation of the terms of the said bill of lading, without any justifiable cause, deviated from the agreed voyage by putting into *Valparaiso*, and by for a long time remaining there, though not prevented by the said excepted dangers from prose-

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cuting the said voyage to the Port of *Queenstown* or *Falmouth*, according to the terms of the said bill of lading, and claimed damages for being deprived for a long time of the cargo and for consequent depreciation thereof.

The defence of the Respondents was shortly as follows:—

On the 24th of May, 1870, the *San Roman* sailed with the cargo from *Port Ludlow*, and after putting into *Mazatlan*, in *Mexico*, on the 22nd of June to land her master, *R. Martens*, who was dangerously ill, proceeded on her voyage under the command of *E. Hacké*, who succeeded to *Martens*, until the 8th of August, when it was discovered that serious injuries had been sustained by her rudder and rudder head, necessitating her going into a port of refuge for repairs, and she accordingly steered for *Valparaiso* as the nearest safe port, where she arrived on the 26th of August, 1870.

Proper surveys were immediately held, and the necessary repairs were proceeded with and completed on or about the 23rd of September; but, in consequence of the war which had broken out between *North Germany* and the Empire of *France* since the sailing of the *San Roman* from *Port Ludlow*, and of the presence of French armed cruisers in and in the neighbourhood of the port of *Valparaiso*, the *San Roman* was unable to leave *Valparaiso* for fear of capture until about the 15th of December, whereupon all necessary preparations for sailing were made without unreasonable delay, and on the 23rd of the said month of December the *San Roman* sailed from *Valparaiso* and proceeded on and completed her voyage, and delivered her cargo to the Appellants.

The Respondents relied upon the exceptions contained in the charterparty and bill of lading and upon the general law, as justifying the master in putting into *Valparaiso* and in remaining there to avoid capture. They also relied upon the express provisions of the North German law contained in the commercial code being applicable to the case, and called a North German advocate to prove that by the North German law the master of the *San Roman* was justified in remaining at *Valparaiso* so long as the risk of capture at sea continued.

The learned Judge of the Court below held that the master of the *San Roman* was justified on the facts proved in putting into

and delaying at *Valparaiso*, and he dismissed the suit with costs.

From this order the appeal was brought.

Mr. *C. P. Butt*, Q.C., and Mr. *Cohen*, for the Appellants:—

The delay at *Valparaiso* was not justified by the circumstances. There was no serious risk of capture during the time which they spent at *Valparaiso*. There was no actual restraint. It was not proved that the French ships were cruising off *Valparaiso*, and if escape was more probable than capture the ship ought not to have remained in port.

The evidence shews that the master was not prevented from proceeding on his voyage by any of the excepted perils. English, and not German law ought to govern the contract for the carriage of the cargo, and the application of English law would be sanctioned by the German law itself; but there is no substantial difference between the English and the German law on this subject.

Mr. *Milward*, Q.C., and Mr. *Clarkson*, for the Respondents, were not called upon.

Their Lordships' judgment was delivered by

SIR MONTAGUE E. SMITH:—

The only question which their Lordships have to determine in this case is, whether a German vessel called the *San Roman* was justified in staying at *Valparaiso* from the 23rd of September, 1870, up to the 23rd of December in the same year, on account of the alleged risk of capture in consequence of the war which then existed between *France* and *Germany*, this being a claim of the English charterers to recover compensation on account of what they allege to be an unreasonable delay. The learned Judge in the Court below has laid down that "an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay," and their Lordships are of opinion that that is a correct statement of the law of *England*. It has been admitted in the argument of the Appellants that it is unnecessary to determine whether this case ought to be decided according to the law of *England* or ac-

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cording to the law of *Germany*, because there is no practical distinction on the subject in the law of the two countries.

Therefore the question their Lordships have to determine is entirely a question of fact, namely, whether the German master had during that time such an apprehension of capture founded on circumstances calculated to affect his mind—he being a man of ordinary courage, judgment, and experience—as would justify delay; and their Lordships agree with the learned Judge in the Court below that there was a sufficient risk of capture to justify this delay.

This is not a case where the master has refused to perform the contract at all. No doubt, if the voyage had been abandoned, then it would have been necessary to shew that he had been actually prevented from performing it; but this is merely a question whether there was a reasonable cause for delay.

The evidence on the subject really is, that it was reported at *Valparaiso*, and generally known, that French vessels of war were continually, during the months, at any rate, of September and October, and for a part of November, sailing in and out of the harbour of *Valparaiso*, *Valparaiso* being the great harbour on that coast; and if French vessels intended to capture German vessels, they were more likely to find prizes coming out of *Valparaiso* than from any other harbour on the coast. There is one particular ship that seems to have come in and gone out, and in ten days more to have come in again. It appears to their Lordships that the German captain in *Valparaiso* could come to no other reasonable conclusion than that the principal object of these French war vessels, of which at one time there were as many as five in *Valparaiso*, must have been to capture German vessels.

Besides that, it appears that the newspapers at *Valparaiso* published reports, correct or incorrect, of captures that had actually taken place; and, in addition to that, it appears that the master went and consulted the consul of his own nation, and the consul advised him, in the strongest language—in fact, almost ordered him—not to go, and told him that, if he would go, he must give him a certificate that he had received due warning against leaving *Valparaiso*. There were other German ships in that harbour, some loaded and some unloaded, and the captains of all of them came

to the conclusion that it would be improper and unsafe to leave *Valparaiso* at that time.

It also appears that the master was far from being a person who waited to the last to leave when the French vessels had for a time departed, but that he was among the first who went to the consul and required his papers for the purpose of leaving. Therefore there is nothing to shew that he was at all neglecting or wishing to violate his duty towards the owners of the cargo. Their Lordships agree with what was said before in the judgment in the case of *The Teutonia* (1)—that the owner of an English cargo on board a foreign ship cannot expect that the foreign master of the foreign ship will take greater precautions with respect to his goods, or will run greater risk in their defence, than he would with respect to goods of his own nation. If their Lordships were to look upon this case as a case in which the cargo was German as well as the ship, or a case in which both ship and cargo belonged to the same person, and then were to ask the question, Would a man of reasonable prudence, under such circumstances, have set sail or waited? it appears to their Lordships most clearly that a man of reasonable prudence would have waited.

Then, when it is remembered that the owner of the cargo is an Englishman, it must be a matter of mere guess whether the cargo would have arrived in *England* sooner than it did if it had started before, because, in the first place, there would be great risk of capture; and secondly, whether the vessel were captured or not, the German ship, during the whole of that voyage from *Valparaiso* to *Cork* or *Falmouth*, and then from *Cork* or *Falmouth* to its port of discharge, would have been justified in taking reasonable precautions to avoid French vessels. Then, if the ship were captured, nobody could tell how long it would have been kept before it was sent to *France* for the purpose of being condemned, or how long it would have taken before the cargo arrived. Therefore it is by no means certain that if the master had gone to sea before he did the cargo would have arrived any sooner.

Then, with regard to the last part of the delay—that after the 13th of November—nobody could tell for a time whether the last French vessel would come back, or whether it was cruising about.

(1) Law Rep. 4 P. C. 171.

J. C.

ANDERSON v. OWNERS OF THE "SAN ROMAN."

THE "SAN ROMAN."

The delay between the 11th and the 23rd of December is too short a delay to be a matter of any importance, yet that appears to be accounted for by his being engaged in procuring money to pay his expenses.

On the whole, their Lordships are of opinion that the judgment of the Court below is perfectly right, and they will humbly advise Her Majesty that this appeal ought to be dismissed with costs.

Solicitors for the Appellants: *Thomas & Hollams.*
Solicitors for the Respondents: *Ingledew, Ince, & Greening.*

J. C.*
1873
March 24.

ALEXANDER M. SMITH, MERCHANT; JOHN SMITH, MERCHANT; AND GEORGE HENRY WYATT, MERCHANT; ALL OF THE CITY OF TORONTO, IN UPPER CANADA . . . . . } APPELLANTS;

AND

THE ST. LAWRENCE TOW-BOAT COMPANY, RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (1).

Tug—Vessel in Tow—Contributory Negligence.

A vessel in tow during a thick fog, knowing that it was dangerous to proceed, did not order the tug to stop, and the vessel in consequence ran aground:—

Held, in an action by the owners of the tow against the owners of the tug for damages, that the vessel in tow contributed to the accident.

THIS was an appeal from Her Majesty's Court of Queen's Bench for the province of *Quebec, Lower Canada*, confirming a judgment of Her Majesty's Superior Court for *Lower Canada*, district of *Quebec*, by which the Appellants' action for damages against the Respondents for the loss of the *Silver Cloud* was dis-

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

missed, and the Appellants were condemned to pay the costs of the appeal.

The Appellants were merchants residing at *Toronto*, in the province of *Ontario, Canada*, and were, at the time of the occurrence which gave rise to this action, the owners of a vessel called the *Silver Cloud*. The Respondents were the owners of certain tow-boats on the *St. Lawrence*, and, amongst others, of a tow-boat called the *Hero*.

In the year 1865 the Appellants commenced an action against the Respondents, to recover damages for the loss of the *Silver Cloud*, which ran aground in a fog while being towed by the *Hero*.

The declaration, filed the 23rd of January, 1865, in effect alleged that the Appellants were the owners of the *Silver Cloud*, and that the Respondents agreed for $100 to tow her safely from *Montreal* to *Quebec;* that, relying on the Respondents' promise, the Appellants placed her in tow of one of the Respondents' tug-boats, which took her in tow; that whilst on the voyage the weather became foggy and navigation was thereby rendered dangerous; that the Respondents and their servants ought then to have brought the tug and vessel to anchor, which they could have done; that they, however, continued to prosecute the said voyage against the will of the persons in charge of the Appellants' vessel, and so carelessly navigated and directed the course of the tug that the vessel was run aground and greatly injured; that the vessel was so run aground solely through the negligence of the Respondents' servants; and that the loss sustained by the Appellants was $17,333·04, which they claimed to recover.

The declaration contained a second count, which varied only in alleging the payment to the Respondents for towing the *Silver Cloud* to have been a reasonable amount.

The Respondents, on the 3rd of April, 1865, pleaded the general issue and a perpetual peremptory exception, which alleged, first, That the *Silver Cloud* was under the control of her own master, crew, and pilot, who gave directions to the *Hero*, and that the negligence (if any) was theirs; and further, that after the *Silver Cloud* was aground her master and crew deserted her, but for which she would have been saved. Secondly, that the *Silver Cloud* ran on shore from inevitable accident.

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The Appellants, on the 10th of April, 1865, joined issue on the Respondents' exception.

The parties proceeded to take evidence, and a large number of witnesses were examined, much of the evidence being contradictory.

The evidence having been completed, the case came on for hearing in the Superior Court before *Meredith*, C.J., on the 6th of June, 1868; and on the 15th of Februrary, 1869, the Court gave judgment for the Defendants, the now Respondents. The view which the learned Judge took of the effect of the evidence will appear from the following passages, which are extracted from his judgment:—

"This action had its origin in the loss of a vessel called the *Silver Cloud*. On the 12th of November, 1864, that vessel, in company with a number of others, left *Montreal* for *Quebec*.

"The vessel in question and the *Margaret Smith* were in tow of the steamer *Hero*, the *Silver Cloud* being in charge of *Augustin Naud*, as pilot, and the *Margaret Smith* in charge of the pilot *Felix Hamelin*. Two other vessels, the *Able Seaman* and *Roseneath*, each having a branch pilot on board, were in tow of the *James McKenzie*; and the *Chatham*, having also a branch pilot on board, was in tow of the *Arctic*.

"On the 18th of November all these vessels left *Batiscan* about the same time, the *Arctic*, with the *Chatham* in tow, leading the way; then followed the *James McKenzie*, towing the *Able Seaman* and the *Roseneath*; and, after them, the *Hero*, with her tows, the *Silver Cloud* (the vessel lost) being next to the *Hero*, and the *Margaret Smith* (the other vessel in tow of the *Hero*) being the last of all.

"Towards evening the weather became foggy, and, in consequence of this, all the vessels appear to have gone at half speed for some time. About five o'clock, as the vessels approached *Cap Rouge*, the mist became so thick that the pilots of the vessels in tow of the *Arctic* and *James McKenzie* deemed it unsafe to proceed further. The *Arctic* and her tow, the *Chatham*, being the leading vessels, were the first to come to anchor. The *James McKenzie* and her tows, which were astern of the *Arctic* followed her example, but the *Hero* and her tows unfortunately passed on, and

all three were aground in about ten minutes after they passed the vessels at anchor. The *Hero* and the *Margaret Smith* got off without any serious injury, but the *Silver Cloud* struck a rock, filled with water, rolled over, and became a total wreck.

"That the persons in charge of the three vessels which so struck were guilty of gross imprudence is only too certain. The fog at the time was so dense that the land could not be seen on either side. So completely had they lost their way that they turned in the river without knowing it, and, when aground, found themselves on the south side of the river, instead of being, as they thought, on the north side.

"The main question, then, that we have to determine is, who, in the present case, ought to be held responsible for the loss resulting from the gross imprudence to which I have just adverted.

"The case of the Plaintiff is that the pilot of the *Silver Cloud* wished to bring his vessel to anchor, and directed the people of the *Hero* to stop for that purpose. The defence is, that the *Hero* was bound to obey the branch pilots on board the vessels she was towing; that the pilot of the *Margaret Smith*, the larger vessel, refused to stop; that the pilot of the other vessel, the *Silver Cloud*, did not order the *Hero* to stop or cast anchor; that, in fact, the only order given to the *Hero* was an order, some time before the accident, to slacken speed, and that that order was promptly obeyed . . .

"The opinion which I have formed is that the pilot of the *Margaret Smith* (the larger of the two vessels in tow of the *Hero*) was, as indeed he himself admits, determined to go on, and I think that the pilot of the *Silver Cloud*, although reluctantly, did allow his own better judgment to be overborne by the wishes of the pilot of the *Margaret Smith* . . . .

"I am inclined to believe that no order from the *Silver Cloud* was heard on board the *Hero*, excepting the order to slacken her speed, which order at the time was obeyed, although soon afterwards the *Hero* was put at full speed, in consequence, I believe, of the weather having for the moment cleared . . . (1).

"After a careful consideration of the evidence I am satisfied that if the pilot of the *Silver Cloud*, contrary to the opinion of

(1) The learned Judge here went into a detailed examination of the evidence.

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Hamelin, the other pilot, had determined to come to an anchor, he could easily have given orders to that effect, so as to have been heard by the people of the *Hero*; and in my opinion it is not established that any such order was so given.

"Even if such orders had been given, and the tug had persisted in disobeying them, I think, notwithstanding the evidence adduced as to this point by the Plaintiffs, that the people of the *Silver Cloud* ought to have cut or cast off the tow-line, whereas, nothing of the kind was attempted, or, as far as I know, even thought of. And this, I may remark, tends further to shew, that the pilot of the *Silver Cloud* had submitted to the wishes of the pilot of the *Margaret Smith*, who was resolved *de poursuivre sa course.*

"On the part of the Plaintiffs it was contended that even if the pilot of the *Silver Cloud* did not order the *Hero* to stop, still the main cause of the accident was the neglect of the master of the *Hero* to stop his engines while in an impenetrable mist. And that the Defendants are as liable as if the mismanagement of the steamer was the sole cause of the accident, upon the principle that all persons who contribute by their imprudence, or want of care, to an accident, by which a third party suffers, incur a joint and several liability. I do not however think that the principle of law upon which the Defendants rely is applicable to the present case.

"The tug and the tow were both subject to the order of the branch pilot on board the tow. He was as well aware of the causes of the danger to which they were exposed as the people of the tug. And under the circumstances of the present case, although I think the tug could not have been blamed if she had insisted upon coming to anchor, yet, I cannot think the people of the tug incurred any legal responsibility towards the owners of the tow, by waiting for orders from the branch pilot of the tow, whilst they in the meantime followed the course which one of the branch pilots was determined to pursue, and in which the others, as I think, had acquiesced."

The Plaintiffs appealed to the Court of Queen's Bench, and the appeal was heard on the 13th of March, 1871, before *Duval*, C.J., *Caron*, *Drummond*, *Badgley*, and *Monk*, JJ.; and on the 19th of

June, 1871, the Court gave judgment, confirming the judgment of the Court below, *Drummond* and *Badgley*, JJ., dissenting.

From the two judgments thus rendered by the Superior Court and Court of Queen's Bench in favour of the Respondents the present appeal was brought.

Mr. *C. P. Butt*, Q.C., and Mr. *Wickens*, for the Appellants:—

The tug, by taking two vessels in tow together, disabled itself from performing her contract properly; for the two vessels might give contradictory orders. There is some evidence that the pilot on board the *Silver Cloud* ordered the *Hero* to stop, but were it otherwise, those on board the *Hero* ought to have exercised ordinary and reasonable care and skill, and not having done so, they must be held guilty of contributory negligence: *Davies* v. *Mann* (1); *Tuff* v. *Warman* (2).

Sir *John Karslake*, Q.C., and Mr. *H. M. Bompas*, for the Respondents, were not called on.

Their Lordships' judgment was delivered by

SIR BARNES PEACOCK:—

This is a suit brought by the owners of the *Silver Cloud* against the *St. Lawrence Tow-Boat Company*, who are the owners of the *Hero*, a steam-tug which was employed for the purpose of towing the *Silver Cloud* upon the *River St. Lawrence* from *Montreal* to *Quebec*. The suit was brought for negligence in running the *Silver Cloud* aground during a dense fog. Chief Justice *Meredith* (the Chief Justice of the Superior Court) tried the case originally. He analysed the evidence very closely, and he came to the conclusion that the owners of the *Silver Cloud* were not entitled to recover.

It appears to be clear that when no directions are given by the vessel in tow, the rule in the case of tug steamers is, that the tug shall direct the course. The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow.

(1) 10 M. & W. 546. (2) 5 C. B. (N.S.) 573.

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The *Hero* was towing two vessels, but their Lordships are of opinion that that does not make any difference in this case. If it had appeared that contradictory orders were given by the two vessels, and that the orders of one were obeyed in opposition to those of the other, the case might have been different. The vessels were proceeding in a dense fog: there were no means of seeing the banks of the river, nor of knowing where they were going; and no doubt there was negligence, on the part both of those on board the ship and of those on board the *Hero*, in proceeding in the way in which they did during the fog. If the *Silver Cloud* had given orders to the *Hero* to stop, and the *Hero* had neglected to obey those orders, then the negligence would have been solely on the part of the *Hero*. But if, on the other hand, those on board the *Silver Cloud* did not give proper orders to the *Hero* to stop, then it appears to their Lordships that they were consenting to proceed in the fog, and that they contributed to the accident which occurred. The rule was clearly laid down by Lord *Kingsdown* in the case of *The Julia*. Speaking of the duties of a tug steamer, he says "a tug is to use proper skill and diligence, and is liable for any damage by her wrongful act. When the contract to tow was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board each; that neither vessel, by neglect or misconduct, would create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of the contract, any inevitable accident happened to the one without default on the part of the other, no cause of action would arise. If, on the other hand, the wrongful act of either occasioned damage to the other, such wrongful act would create a responsibility in the party committing it, if the sufferer had not by any misconduct or unskilfulness on his part contributed to the accident." Their Lordships concur in the opinion expressed by the majority of the Judges in the Court of Appeal that those on board the *Silver Cloud* did contribute to the accident.

The case was tried by Chief Justice *Meredith* in the Superior Court, and after analysing the evidence he came to the conclusion

that they did not give such orders to stop as they were bound to do. Upon appeal to the Court of Queen's Bench, three of the Judges of that Court came to a similar conclusion.

Now their Lordships are asked to reverse the decision of the Superior Court and the decision of the majority of the Court of Queen's Bench upon a question of fact. It would not be right for their Lordships to overrule the decision of those Courts upon such a question, unless they came to a clear conclusion that the Judges of those Courts had come to an erroneous decision. In this case, so far from their Lordships coming to that conclusion, their opinion is in accordance with that of the majority of the judges in the Lower Appellate Court and in accordance with that of the Judge who tried the case (Chief Justice *Meredith*), that the owners of the *Silver Cloud* did contribute to the accident by their negligence in allowing the *Hero* to proceed in the fog without giving that vessel proper orders to stop, when it was dangerous, and dangerous to the knowledge of those on board the *Silver Cloud*, to proceed in the state of the weather in which they were going on.

Under those circumstances, their Lordships will humbly recommend Her Majesty to affirm the judgment of the Court of Queen's Bench, with costs.

Solicitor for Appellants: *J. T. Simpson.*
Solicitors for Respondents: *Bischoff, Bompas, & Bischoff.*

J. C.* 1873 April 23, 24.

THOMAS SHRUBSOLE BEAL, the Master, and HARRY S. EDWARDS, the Owner of the Steamship "JAMES C. STEVENSON" . . . . . } Appellants;

AND

FERDINAND MARCHAIS, the Master, and FRANCIS PINEAU, the Owner of the Barque "BOUGAINVILLE" . . . . . } Respondents.

THE "BOUGAINVILLE" AND THE "JAMES C. STEVENSON."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR (1).

Duty of Steamer approaching Sailing-vessel—Contributory Negligence.

A steamship seeing a sailing-vessel at a distance of two or three miles ought not, even if the lights of the sailing-vessel are not visible, to take a course which will carry her across the bows of the sailing vessel.

In a case of collision, even if the light of one vessel was invisible, the vessel will not on that account be held to have contributed to the collision, where the other vessel has pursued a course which of itself would suffice to produce the collision.

A manœuvre made too late to affect the collision, does not make the ship liable as having contributed to the collision, even if the manœuvre was erroneous.

Where a steamship is approaching a sailing-ship, and does not know what course the other ship is pursuing, it is her duty (whether the lights of the other vessel are visible or not) to take no decisive movement until she can ascertain it.

The law does not appoint any particular place at which the lights should be fixed, but they ought to be placed so as to be properly visible:—

* *Present*:—Sir James W. Colvile, Sir Robert Joseph Phillimore (the Judge of the High Court of Admiralty), Sir Montague E. Smith, and Sir Robert P. Collier.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

Semble :—The fact that the lights of one ship are invisible to the other does not make the former ship contributory when the course pursued by the latter is not in itself prudent and judicious.

THIS was an appeal from an interlocutory decree or sentence of the Judge of the Vice-Admiralty Court of *Gibraltar*, in a consolidated cause of damage promoted and brought by the master and the owner of the steamship *James C. Stevenson*, against the barque *Bougainville* and her freight, for the recovery of damages in respect of losses sustained by the owner, by reason of a collision between the said two vessels; and by the master and the owners of the barque *Bougainville* against the steamship *James C. Stevenson* and her freight, for the recovery of damages in respect of losses occasioned to her said owners, by reason of the collision.

By the decree appealed from the learned Judge held that both vessels were to blame for the collision, and decreed that a moiety of the aggregate damage and costs should be borne by each party. From this decree each party appealed to Her Majesty in Council.

The *James C. Stevenson* was an iron screw steamship of 1226 tons, and at the time of the collision was on a voyage from *Calcutta* to *London, viâ* the *Suez Canal*. The *Bougainville* was a French barque of 1190 English tons, and was bound on a voyage from the coast of *Coromandel* to *Marseilles*.

The collision happened between 11 and 12 on the night of the 29th of March, 1872, in the *Straits of Gibraltar*.

The case on the part of the *James C. Stevenson* was, that she was proceeding under steam, steering about due W., with her masthead and side lights exhibited and burning brightly, and with a fresh wind blowing from the southward, when a vessel under sail, which proved to be the *Bougainville*, was seen ahead at the distance of about three miles. The *Bougainville* was apparently approaching in an opposite direction, but no light could then be seen on her. The helm of the *James C. Stevenson* was ported in order to keep her out of the way of the *Bougainville*, and the *Bougainville* still appearing to be standing towards the *James C. Stevenson*, the helm of the *James C. Stevenson* was put hard a-port, and the green light of the *Bougainville* was then for the first time seen. The engines of the *Bougainville* were stopped, but a colli-

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sion occurred, the stem of the *Bougainville* striking the *James C. Stevenson* on the port bow.

The main grounds of blame charged by the owner of the *James C. Stevenson* against the *Bougainville* were, that the lights of the latter were not so exhibited and placed as to be visible to the *James C. Stevenson*, and to her (the *Bougainville*) having improperly deviated from her course under a starboard helm.

On the part of the *Bougainville*, it was alleged as follows:—

At sunset her regulation lights were lighted, being placed in the position in which they had been always carried by the vessel and are usually carried by French vessels of her build and size—namely, on the fore side of the mizen rigging, outside, and a little lower than the rails, about two feet above the poop deck, and projecting about two feet on each side on a line beyond the cathead.

At about 11.35 P.M., the wind being W. by S., and the weather squally and obscure at times, the *Bougainville* was proceeding through the Straits, steering her proper course, E. by N. compass, with her mainsail (the starboard clew thereof being hauled up), her maintopsail, and her maintopgallant-sail set, and on her foremast her foresail (which was cut high so as to work over the bits), her topsail, and two jibs set, but no sails aft on the mizen-mast, and her regulation lights brightly burning, properly placed and plainly visible.

The man at the look-out reported a white light on the starboard bow, which appeared to be the mast-head light of a steamer about two points on the starboard bow of the barque, and to be about three miles distant.

The barque proceeded without altering her course, expecting the steamer to give way, which she had ample opportunity, as it was her duty, to do. Shortly afterwards the red lights of the steamer became visible, and she came on at right angles to her original course, and immediately across the bows of the barque, by first porting and after hard-porting her helm; a collision was then inevitable, and the helm of the barque was thereupon put hard a-starboard, with the object of deadening the force of the collision. Immediately afterwards the vessels collided, each doing and receiving very considerable damage.

The evidence was taken orally before the Judge. On the part

of the owners of the *Bougainville* it was contended, that the evidence shewed that her lights were, before and at the time of the collision, properly placed and brightly burning, in accordance with the maritime regulations in regard to the lights directed to be carried by sailing-vessels; and that her duty was to keep her course, which she did, until she put her helm hard a-starboard to ease the blow of the collision, and that the duty of the steamer was to have kept clear of her, which, although she might easily have done, she failed to do.

It was contended on behalf of the *James C. Stevenson*, that the evidence proved that those on board were not able to see any light of the *Bougainville* until very shortly before the collision; and, further, that in the form of position in which the lights of the *Bougainville* were placed, her green light would not have been visible to the *James C. Stevenson*, unless the latter was more than two points on the starboard bow of the *Bougainville*.

The learned Judge held that the *Bougainville's* lights were not duly exhibited, and that she improperly deviated from her course under a starboard helm, and that she thereby contributed to the collision; but he held the *James C. Stevenson* to have been also in fault for not having got out of the way of the *Bougainville*, and for not having complied with the 16th Article of the *Regulations for Preventing Collisions at Sea*.

The Court, having found both vessels to be in fault, ordered the damages and costs to be borne in equal proportions by both.

Against this decision both parties appealed.

The appeal now came on to be heard.

A question was raised by the Admiralty Advocate (Dr. *Deane*, Q.C.) as to the right to begin. *Marchais'* appeal was the first appeal entered at the Council office by a few hours; but the other parties were first heard in the Court below.

Their Lordships were of opinion that it would be most convenient to take the appeals in the order in which they were heard in the Court below.

Mr. *Milward*, Q.C., and Mr. *Clarkson*, for the Appellants:—

The barque starboarded instead of keeping her course. The

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lights of the barque were invisible owing to their being improperly placed. The collision was caused by the neglect of those on board the *Bougainville.*

The *Admiralty Advocate* (Dr. *Deane,* Q.C.) and Dr. *Tristram,* for the Respondents:—

The steamer ought to have so acted as to see what course the barque was taking. By Art. 16 "every steamship when approaching another so as to involve risk of collision should slacken her speed." If the steamer did not choose to wait, she ought in the first instance to have starboarded instead of ported. The steamer ought, at all events, to have reversed her engines, which would have prevented the collision. The barque had proper lights, properly screened, and carried where they are usually carried by French vessels.

Their Lordships' judgment was delivered by

SIR ROBERT J. PHILLIMORE:—

This is an appeal from the decision of the Judge of the Vice-Admiralty Court at *Gibraltar* in a case of collision between a steamer and a sailing-vessel. The collision took place in the *Straits of Gibraltar,* according to the best conclusion their Lordships can come to from the evidence, somewhere about eight and a half miles east of *Tarifa.* The nature of the damage was this: The sailing-vessel ran into the steamer at right angles ten feet abaft the stem. The consequences of the collision were very serious to both vessels, both being obliged to put into *Gibraltar* on account of the damage they received. The learned Judge of the Court below found, upon the evidence, that both the vessels were to blame, and he made the usual decree. From that decree appeals have been prosecuted to the Judicial Committee of the Privy Council by both parties.

It will be convenient, before stating the conclusions at which their Lordships have arrived, to notice in the first instance the case of the steamer who appeared as the first Plaintiff here, and also in the Court below. She was called the *James C. Stevenson.* She was a screw steamer of 1226 tons, and 250-horse power, and

was sailing from *Calcutta* with a general cargo for *London*. She passed through the *Suez Canal*, and arrived at the entrance of the *Straits of Gibraltar* on the night of the 29th of March. She says, that at forty minutes past eleven on that night, being eight miles from *Tarifa* light, which bore W. by N., and steering W., and the wind, which was squally, being W. inclining to S., the night being clear but cloudy (it is not immaterial to observe this), and proceeding at the rate of eight and a half knots an hour; while so proceeding a sail was reported right ahead, distant about three miles, apparently coming end on; but she says no lights were visible. The course which she pursued was immediately to port, and she appears from the evidence to have hard-a-ported almost directly afterwards, by which she fell, before the collison took place, seven points off from her original course. It is important to observe here that there is no dispute at all that those on board the steamer were perfectly aware that the vessel right ahead of them was a sailing ship, and, as the learned Judge of the Court below remarked, they must have known perfectly well that she was coming directly through the Straits with the wind directly aft. It is also important to observe that the captain of the steamer entirely misapprehended the existing regulation with respect to his duty in such circumstances. He says in his evidence, "I think that it was the duty of the other vessel, although a sailing-vessel and myself a steamer, to have ported her helm, because she was running free, and it is the rule of the road; and I say that, although we were meeting each other stem on. It would be quite different if she had been close hauled." It is hardly necessary to state that this opinion of the captain of the steamer is directly at variance with the existing regulation of Article 15, viz. that if two ships, one of which is a sailing-ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship.

The steamer ascribes this collision to two circumstances; first, to the invisibility (if I may use such an expression) of the lights on board the sailing-vessel—it not being disputed that she carried lights—their invisibility resulting from their improper position; and also to the sailing-vessel having starboarded instead of keeping her course. This is the case, stated briefly, on behalf of the steamer.

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The case on behalf of the sailing-vessel may be also stated in a few words. She was a French iron barque of very large tonnage, and was coming from the *Cape of Good Hope* to *Marseilles*. She says that on this night, when she was due south of *Europa* light, and midway between it and *Ceuta* light, she saw the white light of a steamer, which proved to be the *James C. Stevenson*, two points on the starboard bow, and distant about three miles. Both vessels agree in putting the distance at which they were mutually discerned at about three miles. She says the wind was W.S.W., one point on the starboard quarter, and her head was E. by N. Then she gives an account of her sails. She says she had her courses, fore and maintopsails, maintopgallant-sails, and two jibs set, the starboard clew of the mainsail being hauled up. She gives the same account of the night that the other vessel does. She says that the white light of the *James C. Stevenson* was discovered at 11.35, and that she was supposed to be steering west; that shortly afterwards the red light of the *James C. Stevenson* was observed, that her course was not discovered by those on board the sailing-vessel until the steamer was seen about 300 yards distant. Then she says that the *Bougainville* had hitherto been kept on her course supposing that the steamer would keep out of her way, but upon the hull of the *James C. Stevenson* being discovered, and it being found that she was coming on at right angles towards the bows of the *Bougainville*, and it being then evident that a collision was inevitable, the helm of the *Bougainville* was put hard to starboard, but the *Bougainville* only fell off one point before the collision.

Now, she on her part, ascribes the collision to these three circumstances, that is by her pleading and by the argument of her counsel. She says that the collision was caused by the rash and improper conduct of the steamer in not waiting to ascertain what course the sailing-vessel was taking; she says that the steamer ought at all events to have reversed her engines, which would have been one mode of preventing the collision; and lastly, the ship says that if the steamer did not choose to wait, she ought in the first instance to have starboarded instead of ported.

In considering this case, it will, I think, be convenient to assume in the first instance that the lights were not visible. On that

assumption what, according to the 15th Article, was the clear duty of the steamer? It was to get out of the way of the sailing-vessel. What getting out of the way is must depend, of course, on the circumstances of each particular case. It may be by porting, it may be by starboarding, it may be by stopping, But according to her own version of the story, the steamer was aware that the sailing-vessel was coming directly through the Straits with the wind directly aft, but she says that owing to the absence of her lights she had no indication of what course the sailing-vessel was pursuing. That vessel was going at the rate of eight and a half or nine knots an hour, and their joint speed must have been something like seventeen or eighteen knots. Being, as she says, in uncertainty as to the course the sailing-vessel was steering, it was surely not the part of a prudent master immediately to take the active and decided step of porting, at the rate which she was then going, of between eight and nine knots an hour, which would carry her to the opposite coast across the bows of the ship. If she was in doubt as to the course of the vessel approaching her, as she says, stem on or a little upon her starboard bow, and as the evidence in their Lordships' opinion seems to prove rather more than that,—between one and two points on her starboard bow, surely it was the part of a prudent master to have waited until he could ascertain which course the sailing-vessel was pursuing. The 16th Article seems to be precise upon this point. "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed." There is no reason why she should conceive that the ship was going to the Moorish side of the Strait, although some suggestions were made to that effect.

In their Lordships' opinion, therefore, the judge came to a perfectly sound conclusion upon this part of the case, that is, in holding that upon the steamer's own statement, upon the assumption that the lights were not visible owing to their improper position, nevertheless, she sinned against the rules of navigation laid down for preventing these unfortunate collisions by not slackening her speed, or waiting, or taking any of those precautions which would have enabled her before she took the decided step of porting to ascertain on what side the sailing vessel was going. It is not necessary, in their Lordships' opinion, therefore, to inquire whether

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it would have been a prudent course on her part, if she elected not to wait, to have starboarded instead of porting, by which manœuvre she cut in between the ship and the lee shore at the rate of seven knots an hour. Their Lordships think that the finding of the learned Judge on this part was perfectly correct, and will advise Her Majesty that it be affirmed.

There then remains the other part of the case, upon which the greater part of the argument has been addressed to their Lordships, namely, as to whether, in the circumstances of this case, it must not be holden that the conduct of the sailing-ship contributed to this collision?

First, as to the contribution to the collision, which is said to have been made by the absence of the proper lights, that is to say, by the lights not being placed in a position in which they were visible. The law does not require any particular place at which the lights should be affixed; though no doubt it does require that they should be so placed as to be properly visible within the scope of the regulations upon that point; but no particular place is pointed out. The evidence in this case establishes these points with regard to the lights, first, that they were carried, and secondly, that they were proper lights, properly screened; and their Lordships incline to the opinion that it also is proved that they were carried in the place in which they are usually carried by French vessels. There has been considerable discussion upon the evidence as to whether the testimony of the master of the ship be credible with regard to the cutting or arching of the foresail, which, according to his evidence, to which he was not cross-examined, and according to the evidence of another witness, was expressly done for the purpose of rendering these lights visible. The vessel was a very large ship, and she had come all the way from the coast of *Coromandel*, and the presumption is in favour of her statement as to the lights.

It may here be observed that if the allegation were correct on the part of the steamer, that the sailing-ship had contravened the rule of navigation in not keeping her course, but in starboarding, it is quite clear that that position is fatal to the other contention that her green light was not visible, because, if the sailing vessel had starboarded earlier than she said she did, unquestionably by

that manœuvre she must have shewn her green light, which it is proved was carried, and which it is proved was of proper quality. She must have shewn her green light to the approaching steamer, and have given her that information of which she complains that she was deprived. The learned Judge of the Court below seems, upon the whole, to have come to the conclusion that there was a *deficit probatio* upon this particular and material point, that it was incumbent upon the sailing-vessel to have proved by more conclusive evidence than she adduced that these lights, so placed in the stern of the vessel, were visible by the circumstance that the foresail was cut or arched in the manner described. The learned Judge seems to have come to the conclusion that there was not sufficient evidence to warrant him in thinking that this point was established, and therefore to have decided on that ground principally that the ship contributed to this collision.

Their Lordships do not think it necessary to express any opinion, as to the conclusion at which they might have arrived if this particular matter had come before them as a Court of first instance, whether they would or would not have been satisfied with the evidence which was produced on behalf of the sailing-vessel to the effect already stated, because their Lordships are clearly of opinion, after consulting with their nautical assessors, and after a review of the whole circumstances of this case, that the sailing vessel, coming through the Strait with the wind as described, was perfectly and clearly seen at a distance of three miles as stated by the steamer, but at all events between two and three miles; that upon the assumption that the lights were not visible, it was still the duty of the steamer not to take that decided course which she did take, in perfect ignorance, according to her own statement, as to which way the sailing-vessel was proceeding; that it was very imprudent, rash, and careless navigation, and was the real cause of this collision; and even assuming that the lights were placed in a wrong position, and therefore were not visible, their Lordships are of opinion, upon the particular circumstances of this case, that it would not be right to come to the conclusion, that the invisibility of those lights could, in any legal sense of the term, and according to the judgments upon the question of contribution to negligence, properly be said to have contributed to this collision.

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Their Lordships have not failed to consider the point which was urged on behalf of the steamer, that the starboarding of the sailing vessel might have contributed to this collision. Their Lordships are clearly of opinion upon the evidence that the starboarding was done at so late a period as to take it completely out of the category of any contribution to the collision; indeed if the starboarding had been at an earlier period it is fatal to the contention of the steamer, that she was not apprised by seeing the green light of the course which the other vessel was pursuing; because the dilemma is obvious: if the starboarding took place at an earlier period, then the green light, which is proved to have been there, must have been seen; if the starboarding took place, as we are inclined to suppose, at a later period, then there was no contribution to the collision by that manœuvre at that late period in the history of the case.

Their Lordships will therefore humbly advise Her Majesty that the decree of the Judge of the Vice-Admiralty Court should be varied so as to pronounce that the steamer is alone to blame for this collision. We think that the costs must follow this decision, and that the sailing-vessel will be entitled to her costs both here and in the Court below.

Solicitor for the Appellant: *Thomas Cooper.*
Solicitors for the Respondents: *Cole, Cole & Jackson.*

WILLIAM McLEAN . . . . . APPELLANT;

AND

ALEXANDER McKAY . . . . . RESPONDENT.

J. C.*
1873
May 8, 9.

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE FOR THE COUNTY OF HALIFAX, IN THE PROVINCE OF NOVA SCOTIA (1).

Contract—Validity of Contract—Easement—Covenant running with the Land—Agreement by Vendor of Land with Purchaser, that adjoining Land "should never be hereafter sold, but left for the common Benefit of both Parties and their Successors"—Construction of Deed.

The owner of some land sold a part of it and entered into an agreement with the purchaser that an adjoining plot of land "should never be hereafter sold, but left for the common benefit of both parties and their successors:"—

Held, that this was merely an agreement that the plot of land should be left open, in the state in which it then was, for the common advantage of both parties, and that such an agreement did not contravene any rule of law, but gave the person who might hold the vendee's land, the right to enforce the obligation against the person who might hold the vendor's land. Thus the former might apply to a Court of Equity to order the removal of a structure that had been placed on the plot in violation of the agreement.

The Privy Council will exercise its discretion in deciding a case on its merits, without regarding strictly the precise terms of the pleadings.

THIS was an appeal from an order of the Supreme Court of Judicature for the county of *Halifax*, in the province of *Nova Scotia*.

The case involved questions as to the construction and as to the validity of a deed granting some land at *New Glasgow*, in *Nova Scotia*.

The deed was dated the 28th of April, 1834, and was made between *William Forbes* and *Robert McIntosh*, both of *New Glasgow*. *Forbes* was the owner of some land at *New Glasgow*. Part of it he sold to *McIntosh*; part of it he retained for himself; and a plot

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

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adjoining both the other parts he reserved, as never to be sold, but left for the common benefit of both parties. The deed witnessed that in consideration of £14, *William Forbes* granted and conferred unto *Robert McIntosh*, his heirs and assigns all that certain tract of land situate, lying, and being in the town plot of *New Glasgow* aforesaid, and hath such shape, form, and marks as appears by plan hereunto annexed, abutted and bounded as follows, viz.:— Beginning 16½ feet from centre of *Provost Street* and 3 feet from the corner of *John Johnstone's* stone house, thence to run south 30 degrees west, 38 feet to a stake and stones, thence north 60 degrees west, 44 feet more or less, so as to leave 10 feet of a passage clear from the corner of the said *William Forbes's* stone house, thence 50 feet upon an oblique line, winding to leave 10 feet clear past the end of the said *William Forbes's* stone house for the benefit of both parties, to a stake and stones, thence north 30 degrees east, 17 feet to a stake and stones, and thence south 60 degrees east, 85 feet to the place of beginning, containing 2627 area feet of land, be the same more or less; and by the true intent which was unanimously agreed upon between the parties, that any distance which may remain westwardly to *Jury Street* should never be hereafter sold, but left for the common benefit of both parties and their successors, &c.

In 1844 *William McIntosh* sold his land to *Alexander McIntosh*, who, in 1853, sold it to the Appellant.

The Respondent was now the representative of the estate of *William Forbes*, who had died.

In 1866 the Respondent placed some buildings on the plot in question; thereupon the Appellant commenced proceedings to compel him to remove these buildings. The declaration of the Appellant alleged that the buildings were erected on the plot reserved by the deed as "never to be hereafter sold, but left for the common benefit of both parties;" that this was a wrongful obstruction, inasmuch as the Appellant was entitled to an easement, appurtenant to his lands, of the free and unrestricted use and benefit of the reserved plot. And it prayed for a writ of mandamus, commanding the Respondent to remove the buildings, and further, for a decree ordering the Respondent to pay to the Appellant $200 damages.

The Judge in Equity (the Hon. *James Johnstone*) gave judgment in favour of the Appellant, and ordered the obstruction to be removed.

On appeal to the Supreme Court of Judicature for the county of *Halifax*, this judgment was reversed; the Chief Justice, Sir *William Young*, Judge *Wilkins*, and the Judge in Equity (who had changed his opinion) being in favour of a reversal, while Judges *Des Barres* and *Ritchie* dissented.

It was against this last decision that the appeal was now brought.

There were two questions in the case: 1. As to the true extent and position of the land referred to in the deed; and 2. As to the validity of the agreement with respect to the reserved plot of land.

Mr. *Bristowe*, Q.C., and Mr. *Colt*, for the Appellant. [After alluding to the contention of the Appellant with respect to the construction of the deed as to the parcels]:—

With regard to the contract as to the reserved plot, that it "should never be hereafter sold, but left for the common benefit of both parties and their successors," it does not contravene any rule of law. The Appellant is entitled to apply to a Court of Equity to restrain the Respondent from building on the plot, although the covenant does not run with the land: *Rankin* v. *Huskisson* (1); *Tulk* v. *Moxhay* (2); *Patching* v. *Dubbins* (3); *Coles* v. *Sims* (4); *Western* v. *MacDermott* (5); *Mann* v. *Stephens* (6); *Kerr* on Injunctions, p. 530. Moreover, the Appellant is entitled to damages: *Eastwood* v. *Lever* (7).

Ever since the original grant the land in dispute has been used and enjoyed in a manner consistently with the Appellant's claim. This is to be taken into consideration in determining what was the meaning of the parties to the original grant.

Mr. *Watkin Williams*, Q.C., and Mr. *Cohen*, for the Respon-

(1) 4 Sim. 13.
(2) 2 Phill. 774; 11 Beav. 571.
(3) Kay, 1.
(4) Kay, 56.
(5) Law Rep. 2 Ch. 72.
(6) 15 Sim. 377.
(7) 4 De G. J. & S. 114.

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dent. [After alluding to the contention of the Respondent with respect to the construction of the deed as to the parcels]:—

The rights over the reserved plot, if any, did not run with the land or pass to the Appellant, and the covenant in the deed is not binding on the Respondent: *Moore v. Greg* (1).

What the Appellant claims is an easement of the free and unobstructed use and benefit of the plot. This is a servitude of too extensive a character for the Court to enforce. By the principle of the tenure of land no such obligation can be created: *Bailey* v. *Stephens* (2); *Duke of Bedford* v. *British Museum* (3); *Clayton* v. *Corby* (4); *Smith's* Leading Cases, 6th ed. p. 76.

Moreover the contract says nothing about the stipulation being for the benefit of the land sold.

Mr. *Bristowe*, Q.C., in reply.

Their Lordships' judgment was delivered by

Sir Montague E. Smith:—

This is an appeal from a judgment of the Supreme Court of Judicature for the county of *Halifax* in *Nova Scotia*, which reversed the decree of the Judge in Equity in favour of the Appellant, who was the Plaintiff in the suit below. The Judges in the Supreme Court were divided in opinion. The Court consisted of five Judges, of whom the Judge in Equity was one. The four Judges who heard the cause for the first time were divided in opinion; but the learned Judge in Equity, having changed his own view of the case, created the majority of the Court, which reversed his own decree. Their Lordships regret that the learned Judge should have found occasion to change the opinion to which he had originally come, for, after full discussion of the case, their Lordships are of opinion that his first judgment was right in its reasoning and sound in its conclusion.

The suit was brought by the Plaintiff to obtain the removal of a house or shop which had been placed by the Defendant upon a piece of ground to which the question relates. It was contended

(1) 2 Phill. 717.
(2) 12 C. B. (N.S.) 91.
(3) 2 M. & K. 552.
(4) 5 Q. B. 415.

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on the part of the Appellant that this piece of ground was, by the agreement under which he purchased an adjoining property, agreed to be left as an open space; that in violation of that agreement the Defendant had placed the house upon the ground, and that he had an equity to have it removed.

It appears that before the year 1834 a large piece of ground was the property of Mr. *William Forbes*. The ground lies in the town of *New Glasgow*, and it was at that time building ground. Mr. *Forbes* had himself built a house upon the land, and he sold a part of the adjoining ground to Mr. *McIntosh*, and the piece in dispute adjoins Mr. *Forbes's* original house and the ground which he sold. It appears that *McIntosh* afterwards sold the ground which he had so purchased, and that it has come by mesne conveyances to the Plaintiff. Therefore he derives the title derivately from *McIntosh*, the original vendee. Mr. *Forbes*, the vendor, is dead, but the present Defendant represents his estate. It is not necessary to say in what way he represents it,—he is guardian of the infant heir,—because it was admitted on the part of the Respondent that he did directly represent the estate which Mr. *Forbes* had.

Soon after *McLean* purchased the property, he built upon it; but it is, perhaps, not quite correct to say that he built upon it, because it appears to be the custom in that part of *Nova Scotia* to build houses, and run them on the ground, and plant them there ready built. However, he placed upon the land a house or shop, and that occurred some years ago.

The questions turn upon the construction of the original deed of conveyance from *Forbes* to *McIntosh*; and two main questions arise—first, whether a clause in the deed covers the land in dispute; and, next, whether, if it does, the agreement relating to that land is of a character which the law will recognise and enforce.

The first question depends entirely upon the language of the deed applied to the state of the ground, and the circumstances which existed at the time. It must be construed with reference to the extrinsic circumstances as they then existed. The deed is dated the 28th of April, 1834. Mr. *Forbes* is the vendor and Mr. *McIntosh* is the vendee. A small sum appears to have been given for the land; but that cannot control the effect of the deed. By

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the deed, Mr. *Forbes* grants the land he intended to sell; and in the description of this land are found the words so much referred to in the argument relating to the passage. The description is:—"All that certain tract of land situate, lying, and being in the townplot of *New Glasgow* aforesaid, and hath such shape, form, and marks as appears by plan hereunto annexed, abutted and bounded as follows." Unfortunately, that plan is not forthcoming, and it appears to be uncertain whether it was originally annexed to the deed, or whether, having been annexed, it is now not to be found. Those, therefore, who have to construe this deed, have only the words to guide them, unassisted by the plan which the parties themselves thought necessary to help the construction of the words. The piece of land is to have such shape, form, and marks as would appear from the following description:—"Beginning 16½ feet from centre of *Provost Street*, and 3 feet from the corner of *John Johnstone's* stone house." That is the first point, the starting point. "Thence to run south 30 degrees west, 38 feet to a stake and stones." That is, it is to run in a south-westerly direction to an artificial mark that had been placed on the ground, a stake and stones; "thence north 60 degrees west, 44 feet more or less,"—and now come the words which have been the subject of so much contention:—"so as to leave 10 feet of a passage clear from the corner of the said *William Forbes's* stone house." Then it goes on, "thence 50 feet upon an oblique line, winding to leave 10 feet clear past the end of the said *William Forbes's* stone house for the benefit of both parties, to a stake and stones." Now the piece of ground, which was the subject of sale, was an open piece of ground to be separated from other open ground, and that was done by means of lines to be drawn from and to certain fixed points; and it is obvious that it was the intention of the parties that the land to be sold to *McIntosh* should not impinge upon *Forbes's* stone house, but that a space should be left between the land to be sold and *Forbes's* house, and that that space, running up to the north-east, should be 10 feet, so as to form a passage for the common benefit of both. And, in order to draw that line, the description is given that "thence north," that is, the line is to be drawn "north 60 degrees west, 44 feet, more or less," and drawn "so as to leave 10 feet of a passage clear from the corner of the

said *William Forbes's* stone house." It must stop short of *Forbes's* stone house by 10 feet; and then the next description shews that the line is to curve, so as to get round the corner, and when it has got round the corner, it is to be drawn, still leaving 10 feet, to the stake and stones placed at a further point in a direction away from *Jury Street*. Nothing is there said about a passage to *Jury Street*. The Judges of the Supreme Court, who were in favour of the Respondent, seem to have thought that, from the use of the word "passage," and from the direction to draw the line so as to leave a passage 10 feet clear from the corner of *William Forbes's* stone house, it might be inferred, taken in connection with the clause at the end of the description, that there was to be a passage left to *Jury Street*. It appears to their Lordships that that is a construction which is not warranted by the words; that the Court insert by implication that which the parties have not expressed, and have done so when there appears little reason for doing it; because in that part of the description the parties were using precise language. They had put down stakes and stones to denote the bounds where there was nothing on the ground to denote them. If the parties had wished to describe a passage to *Jury Street*, which was a well-known street at that time, there would have been no difficulty in their saying, if they had so meant, "a passage of 10 feet by the front of the house to *Jury Street*," but that they have not done. After directing how the line is to be drawn up to the south-east point, the description goes on to get the remaining boundaries, so as to complete the boundaries of the piece of land which is to be sold; "thence north 30 degrees east, 17 feet to a stake and stones,"—another artificial point—"and thence south 60 degrees east, 85 feet to the place of beginning, containing 2627 area feet of land, be the same more or less." There is thus a complete description of the lands sold. Then comes what appears to be an independent covenant or agreement between the parties, "and by the true intent which was unanimously agreed upon between the parties that any distance which may remain westwardly to *Jury Street* should never be hereafter sold, but left for the common benefit of both parties and their successors." The words are, "that any distance which may remain." Well, remain after what? The natural construction appears to be, the land

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which may remain after that which has been sold has been deducted from the whole piece of land; that is, "which may remain" after what has been sold, "westwardly to *Jury Street*," that is, westwardly of all the land which has been sold down to *Jury Street;* and this, it is admitted, would include the spot upon which the Respondent's house has been placed.

There is really nothing which can be legitimately called in aid to assist the construction of this deed. The subsequent use can hardly be relied upon to construe it; and their Lordships think that the evidence which has been given of the express intention of the parties was not admissible. If admissible, the evidence given by the nephew of the original vendor seems to be conclusive to shew that the intention of the parties was that the piece of land in dispute should come within the operation of this clause, whatever that operation may be. The contention on the part of the Defendant has been, at the Bar to-day, what it originally was before the Judge in Equity, and the Judge in Equity says, in his first judgment, "The Defendant has endeavoured to explain the reservation as designed to give a passage way of 10 feet from the *McIntosh* lot to *Jury Street* by the front of the stone house. There is nothing in the language to support this idea; and it is to be noted that even the 10 feet vacancy is not distinctly reserved for a way, and in the reservation under consideration not a word is said of right of way or of access to *Jury Street*." Their Lordships think that in that passage the learned Judge in Equity gave the true answer to the contention of the Respondent.

The second question relates to the character of the clause in its legal aspect. It was contended on the part of the Respondent that the covenant or agreement was an attempt to create servitudes which the law would not allow. Their Lordships have felt some difficulty in arriving at a conclusion respecting the proper construction to be given to this clause in the agreement and as to what it was the parties really meant. This question, also, becomes one of construction. If construed in the way in which Mr. *Watkin Williams* sought to construe it, undoubtedly the agreement would be one which the law must hold to be invalid, as an attempt to deal with property in an unauthorized manner, that is, unauthorized by the rules and principles which govern rights in real property.

But their Lordships think that a more limited construction is the reasonable one. The words are, "and by the true intent which was unanimously agreed upon between the parties, that any distance which may remain westwardly to *Jury Street* should never be hereafter sold, but left for the common benefit of both parties and their successors." It was scarcely contended, on the part of the Appellant, that a perpetual restriction upon the sale of the land would be valid; but it was contended that that part of the clause might be separated from the rest, and that the remainder created a restriction which the law would recognise. On the part of the Respondent, it really was not denied that such a separation might be made. The construction relied upon on the part of the Appellant was, that this clause amounts to no more than an agreement that the piece of land which adjoined the house of *Forbes* and the land which he had sold to *McIntosh* should be left open in the state in which it then was, for the common advantage of the parties. The clause uses no technical words. It is written in popular language which unskilled men would employ; and reading the language in its ordinary and natural sense, the intention of the parties to be collected from it apparently is that the space described should remain as it was. Of course, by agreement the subsequent use and enjoyment of it might be in any way arranged between them; but, as far as the legal obligation of this deed went, the restriction amounted to no more than an agreement on the part of Mr. *Forbes*, who was to retain the ownership of the land, to leave it in the state in which it was.

It was suggested that the agreement was not one which equity would enforce, because it was not declared to be for the benefit of the land which the Appellant held. Undoubtedly the clause does not say in terms that the ground is to remain open for the benefit of the land which *McIntosh* had bought, but really it must be implied. There could be no object in stipulating that it should be left open for the benefit of both parties, unless it meant for the benefit of both parties as owners of the lands which adjoined the plot. Therefore the implication is natural and irresistible, that when the parties speak of leaving this piece of land open for the common benefit of both, they meant for the common benefit of both as holders of the adjoining lands. Undoubtedly if the true

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construction of this clause had been that the parties meant that there should be a common use of the plot, and a common partaking of the profits in some undefined way, that would be an indefinite and uncertain agreement relating to land which it would not be possible for the Court to enforce; but construing this clause as an agreement to leave the land open for the advantage of the two adjoining proprietors, it falls within a class of cases which are well known, and which have been frequently before the Courts in this country.

It was not contended on the part of the Appellant that this was a covenant which would run with the land, so as to enable the covenantee to maintain an action in a Court of law upon it, but that it was an agreement by the vendor, selling part of a larger estate, with the vendee, affecting the enjoyment of the land he sold, and putting a restriction upon himself in dealing with the land he retained. That it was an agreement affecting the lands of both, binding those who might hold the land of the covenantor to observe the obligation, and giving a right to those who held the land of the vendee, in whose favour the obligation was made, to enforce it. This contention is supported by the authority of Lord *Cottenham*, in *Tulk* v. *Moxhay* (1), who held that such a contract created an equity between the original parties, binding all who came into possession derivatively with notice of it.

Two other cases have been referred to in which there were agreements to keep land open for the benefit of the adjoining property, and in which those holding the land, for the benefit of which those agreements had been made, were held to be entitled in equity to enforce them. In both cases the agreements described the places to be kept open, and the way in which only they should be used; but there was no express mention in the deeds that this was for the benefit of the property sold; but the Court had no difficulty in finding that that was the object and intention of the parties who entered into the agreement. These are the cases of *Mann* v. *Stephens* (2); *Patching* v. *Dubbins* (3).

If their Lordships had been compelled, in construing this deed, to hold that the parties intended to create those indefinite rights of property or easement for which Mr. *Watkin Williams* contended,

(1) 2 Phill. 774. (2) 15 Sim. 377. (3) Kay 1.

undoubtedly their judgment must have been different from that which they now give; but construing the clause in the way in which they do, simply as an agreement between the two parties that this space shall be kept open for the advantage of both proprietors, they come to the conclusion that it is one which does not contravene any rule of law, that it creates an equity which binds the present Respondent, and that the Appellant who has the estate of the original vendee is entitled to come to the Court of Equity for its assistance to remove the structure which is placed upon the land in violation of it.

The declaration of the Appellant undoubtedly does not put his case in the most favourable way for himself, nor quite in the true way; but the Courts below have not decided the case upon that ground. Their Lordships think that when it comes here upon appeal, after having gone through the ordeal of two Courts below, they are exercising a right discretion in not regarding strictly the precise terms of the pleadings, and in deciding the case upon its merits.

Their Lordships will humbly advise her Majesty to reverse the decree of the Supreme Court, and to order that in lieu thereof the appeal to that Court from the Judge in Equity be dismissed with costs. The Appellant will have the costs of this appeal.

Solicitors for the Appellant: *Sole, Turner & Turner.*
Solicitors for the Respondent: *Dawes & Sons.*

J. C.* 1873 May 24, 26.

JOHN DOWARD, AND JOHN DICKSON, THE OWNERS OF THE BARQUE "ESTRELLA" . . } APPELLANTS;

AND

WILLIAM LINDSAY, THE OWNER OF THE SHIP "WILLIAM LINDSAY" . . . . . } RESPONDENT.

THE "WILLIAM LINDSAY."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND (1).

Collision in Harbour—Moorage—Precautions against Storm.

2PD. 36-7

A vessel in port was moored to a buoy, the use of which was sanctioned by the authorities, and, a storm being expected, she also had her anchor ready to drop. The mooring buoy broke and the vessel drifted. She attempted to cast anchor, but was prevented by inevitable accident. She came into collision with another vessel which was properly moored :—

Held, that the first vessel had not contributed by negligence to the collision.

Where the master of a ship takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, his owners are not held responsible because he may have omitted some possible precaution which the event suggests that he might have resorted to.

When the authorities of a port permit vessels to moor, take in and discharge cargo at a certain buoy, it must be assumed that they sanction the use of the buoy and treat it as a proper and sufficient mooring place.

THIS was an appeal from a decree of the High Court of Admiralty of *England*, pronounced on the 24th of January, 1873, in a cause of damage instituted on behalf of the owners of the barque *Estrella*, against the *William Lindsay*, her tackle, apparel, and furniture, and against her owners intervening, for the recovery of damages in respect of a collision between the said two vessels.

The *Estrella* was a barque of about 499 tons register, and the *William Lindsay* a ship of 970 tons register.

* *Present* :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

The collision in question took place in the port of *Valparaiso*, shortly after 11 o'clock A.M., on the 23rd of September, 1871.

The case set up by the petition filed on behalf of the *Estrella* was, that on the evening of the 22nd and morning of the 23rd of September, the *Estrella* was lying safely moored in the harbour of *Valparaiso*, and at the same time the *William Lindsay* was lying about three-quarters of a mile to the northward of the *Estrella*, fastened to a buoy in the harbour by her starboard cable, from which the anchor had been unshackled. The buoy was not one of the buoys belonging to the port authorities, nor intended nor adapted for use as a mooring buoy, and was not on the usual mooring ground. On the evening of the 22nd it came on to blow a gale from the north, but the *William Lindsay* did not let go any anchor, remaining at the buoy as before the gale. On the 23rd she became detached from the buoy, and began to drive to the southward. Those on board of her let go her port anchor in great haste; but, when about 30 fathoms had run out, the cable became "jammed" in the windlass, and, continuing to drive to the southward, she struck the *Estrella* with great violence, doing her much damage.

The case set up by the answer filed on behalf of the *William Lindsay* was as follows:—"On the 19th of September the *William Lindsay* went into *Valparaiso Bay* to discharge fifty tons of coal, and moored to a buoy on the eastern side of the bay on the customary mooring ground. On the morning of the 20th Her Majesty's ship *Scout* was about to practise with shot, and the *William Lindsay*, happening to be in the line of fire, was ordered by the port authorities to remove to the western side of the bay and moor to a buoy there. This she accordingly did, mooring by 30 fathoms' length of the starboard cable to a buoy not belonging to the port authorities, but which was intended and adapted for use, and constantly used as a mooring buoy by vessels of the size of the *William Lindsay* using the said harbour. The cable of the *William Lindsay* was properly made fast to the top of the buoy, and 30 fathoms of the cable were paid out. The *Estrella* was at the time lying moored in-shore, at a discharging berth about from a quarter to a half a mile from, and bearing S. to S.S.E. of, the *William Lindsay*.

On the morning of the 23rd of the said month of September, the *William Lindsay* was still lying moored as aforesaid, when a fresh

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breeze came on from about N.N.W. to N., with a swell; and at about 3 A.M., when the wind was about at the freshest, 15 fathoms more chain were, as a matter of precaution, paid out on the starboard cable.

Shortly after 11 A.M. on the said morning the wind had fallen considerably, and the *William Lindsay* was riding easily, when, in consequence of the shackle-band of the buoy giving way, the *William Lindsay* went adrift. The port anchor of the *William Lindsay*, which was in readiness to let go with a proper quantity of chain ranged on deck, was let go without delay; but when about 20 fathoms of the port cable had run out, it accidentally became jammed under the windlass; and although every effort was made to clear it by the crew of the *William Lindsay*, they only succeeded in getting it clear just as the *William Lindsay* was about to strike the *Estrella;* and the *William Lindsay* with her starboard side, between the poop and mainrigging, came into collision with the jibboom and bowsprit, and then with the stern, of the *Estrella.*

The Respondent alleged that the said collision was, so far as the *William Lindsay* was concerned, an inevitable accident.

Evidence having been taken, on the 24th of January, 1873, the Judge of the High Court of Admiralty, who was assisted by two Elder Brethren of the Trinity Corporation, gave judgment pronouncing that the said collision was the result of inevitable accident, and dismissed the Defendants, but made no order as to costs.

From this judgment the *Estrella* appealed.

Mr. *C. F. Butt*, Q.C., and Mr. *H. Davison*, for the Appellants :—

The fact of the collision with a ship at its moorings makes a *primâ facie* case of negligence against the *William Lindsay*, and throws upon her the burden of proving that the defect in the buoy could not have been discovered with ordinary care: *The Egyptian* (1).

The buoy was only a private buoy. The master of the *William Lindsay* ought to have examined the buoy, and had no right to treat it, without examination, as if it had been a part of his own mooring-chain. She ought to have actually let go her anchor at

(1) 2 Mar. L. Ca. (O.S.) 56.

once, and the ship was already in default when the jamming took place. *The Volcano* (1).

The *Admiralty Advocate* (Dr. *Deane*, Q.C.), and Mr. *Clarkson* (with whom was Mr. *Deane*), for the Respondents :—

The buoy was sanctioned by the authorities, and was a public and proper mooring-place. The *William Lindsay* took every reasonable precaution.

Mr. *Butt*, in reply.

SIR MONTAGUE E. SMITH :—

This is a case of collision which occurred at *Valparaiso* on the 23rd of September, 1871. On that day the *William Lindsay*, a steam-vessel of the Respondent's, was driven against the *Estrella*, a barque of about 500 tons, belonging to the Appellants, doing her considerable damage. The *Estrella* was lying in the harbour at the usual mooring place for vessels to discharge cargo. She was moored in the usual way, with two anchors out at the bow, and one at the stern. She was in a position of entire safety, and undoubtedly no fault can be attributed to her. The *William Lindsay* was driven against her by the force of the wind, and did her the damage complained of. The question is, whether the injury which was done to the *Estrella* by the *William Lindsay* was the result of an accident which ordinary care could not have averted, or whether it was due to any want of care and skill on the part of the *William Lindsay*.

The *William Lindsay* entered the port on the 19th of September, and she was moored by the tug which brought her into the port at one of the buoys which belonged to the steam-tug company. It appears from the evidence that there are several of these buoys in the port, and that it is usual, when vessels are towed into the port, to moor them to these buoys, that when they discharge cargo they are moved usually to mooring-berths, which are appropriated to the discharge and taking in of cargo, but that it occurs at times, where a small quantity only of cargo is to be discharged or taken in, the port authorities allow it to be done at some of

(1) 2 W. Rob. 337.

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these mooring-buoys. On the 19th the *William Lindsay* came in and was so moored. On the 20th, the following day, one of her Majesty's vessels, the *Scout*, which happened to be in the port, was about to practise with shotted guns, and the *William Lindsay* was in the line of fire. It was necessary, therefore, that she should be moved, and it would appear that she was moved by the order of the Captain of the Port to another buoy belonging to the Steam-Tug Company on the other side of the port. This being done, she fastened her cable to the buoy, and she rode there from the 20th of September until the 23rd, when the collision took place.

It seems that on the 23rd a strong breeze, some of the witnesses say a gale, arose, and blew with considerable strength. It was what is known in the port as a "norther," a wind very well known, and undoubtedly a wind which blows with considerable violence, and usually for some length of time. The vessel rode out the greater part of the gale, and she rode safely until the gale had moderated; but there was, after the gale had moderated, a heavy swell, and during that time the accident occurred which has given occasion for the present suit.

The accident was, that the iron band which was round the buoy, and in which there was a shackle to which the ship's cable was attached, broke. Of course the ship was no longer held by the buoy, and she began to drift. Now at the time that she so began to drift before the wind she had her anchor ready to let go; and it appears that, without any delay, and as promptly as they well could, her crew let go the anchor, and were paying out the chain when the windlass became jammed. The consequence was that the anchor did not touch the ground, and she drifted until she came into collision with the *Estrella*. Now no blame is imputed to the *William Lindsay* for that jamming of the chain. It appears from the evidence, and was so found by the learned Judge below, that the windlass was a proper one, that there were the usual appliances, that the chain was good, and that the men had done nothing wrong in the way they had handled it. It, therefore, was a purely accidental circumstance that the anchor did not find its way to the ground; and if it had found its way to the ground there seems to be no doubt that the ship would have been brought up, and this collision would not have occurred.

These being the facts, the question arises whether there was any negligence in what was done or omitted to be done on board this vessel. Now, the master is bound to take all reasonable precautions to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible, because he may have omitted some possible precaution which the event suggests he might have resorted to. The true rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed. In this case the immediate cause of the mischief was the breaking of the band on the buoy, and it is said that the *William Lindsay* must be responsible for that breaking, because the master had chosen to moor her to it, and to treat it, without examination, as if it was his own mooring-chain.

Their Lordships consider that that is not the correct view of the question. The first question is, whether there was negligence on the part of the master in availing himself of the use of the buoy; and in order to see whether there was such negligence or not, it is necessary to ascertain what was the nature of the buoy, and how it was used and sanctioned. Now it appears that it was one of several buoys which had long been laid down in the port by the steam tug company. It was undoubtedly [under the care of a private company, as far as can be collected from the evidence; but the mooring of ships to these buoys is sanctioned by the authorities in the port. It must be assumed that when they give permission to vessels to moor at them, not only when they come into the port, but occasionally to take in and discharge cargo, that they sanction the use of these buoys, and treat them as proper and sufficient mooring places for vessels frequenting the port. That being the state of the case as regards these buoys, their Lordships cannot think that there was anything like negligence on the part of the master of the *William Lindsay* in mooring at one of them without examining for himself whether there might be latent defects in it. These questions of negligence must be decided by what a prudent and skilful seaman would do under the circumstances, and by what he is able to do. It is obvious that no man, however prudent and however desirous to be on the safe side,

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would be able to examine these buoys, so as to discover whether there were latent defects in them or not. He must, to a certain extent, trust to the sanction which has been given to them by the authorities of the port. No doubt that would not absolve him from all further precaution. He ought not implicitly to trust to that which he cannot to a certainty know is a safe buoy, and he ought to take reasonable precautions, in the event of its not holding him, to bring up, and secure himself from danger. Their Lordships think, however, upon this first question, that there was no negligence on the part of the master in mooring to the buoy, and not discovering the defect which undoubtedly led to the accident.

Then the next question is, whether, having moored to this buoy, he ought to have taken any other precaution than he did. Now, it is scarcely contended on the part of the Appellants that the master need have done more in ordinary weather than fasten his chain as he did to the buoy; but it is suggested that when the gale came on, and when he found it was likely to continue, he should have taken the further precaution of letting go his anchor, —not only of keeping it prepared to take the ground, but that he ought to have let it down, and given that further security to his ship. Undoubtedly that is a question well worthy of consideration, but it is a question which depends entirely upon practical seamanship; and their Lordships upon that question have thought it right to consult the nautical assessors, whose valuable assistance they have, and to put the question to them very much in the way in which Dr. *Lushington* put a similar question to the Trinity Masters in the case of *The Volcano* (1), which was relied on by the Appellants. In that case the *Volcano* was not moored to a mooring buoy, but she had a small anchor dropped, and a large anchor ready to let go. The question Dr. *Lushington* put to the Trinity Masters was this: "How far there was an immediate necessity or otherwise for dropping the second anchor, is not the real question in this case. The question is, whether it would not have been a prudent and proper precaution to have done so. I do not mean that you are to strain the matter; but, considering the facts of the case with reference to the position of the *Helen*, the state of the wind, and

(1) 2 W. Rob. 337.

all the circumstances, you will have to determine how far it is a measure which men acquainted with nautical affairs ought, in ordinary prudence, to have adopted." The nautical assessors, in answer to the question put to them, have informed their Lordships that they think it was a better course for the master of the *William Lindsay* to have kept his anchor, as it was, prepared to be let go, than, when the storm came on, to have dropped it; that it is not usual nor safe, when vessels are riding at mooring-buoys with the length of cable which this vessel had out, to drop an anchor. The more usual and practical, and, as they think, the better course, is to keep the anchor ready to let go in case of accident. That opinion having been given to their Lordships by gentlemen of nautical experience, they think it determines the second question in the case in favour of the Respondents. It is clear that the *William Lindsay* had her anchor ready to let go, that she did all that was possible to effect that manœuvre and to drop the anchor, and she did not succeed in that operation by reason only of an inevitable accident.

Under these circumstances their Lordships are of opinion that the judgment of the Judge of the Admiralty Court is right, viz. that no negligence can be imputed to the *William Lindsay*.

The result will be that they will humbly advise Her Majesty to affirm the judgment of the Court below and to dismiss this appeal with costs.

Solicitor for the Appellant: *W. W. Wynne.*
Solicitors for the Respondent: *Toller & Sons.*

J. C.* 1873 March 18, 20; May 3.

ARTHUR LARIOS . . . . . APPELLANT;

AND

ANTONIO BONANY Y GURETY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR (1).

Jurisdiction of Supreme Court of Gibraltar—Procedure of that Court—Contract to advance Money—Specific Performance—Damages—21 & 22 *Vict. c.* 27.

Though the Supreme Court of *Gibraltar* may be bound, in administering law, to follow the principles which govern English Courts of Law, and, in administering equity, to follow the principles which govern English Courts of Equity, yet, where a suit for specific performance is commenced before it, and it is found that the Plaintiff ought not to have taken proceedings in equity, but at law, for damages in respect of a breach of contract, the Court may, amending the pleadings if necessary, continue the case as if the Plaintiff had brought an action for damages.

A *Gibraltar* firm entered into a contract with *A. B.*, of *Algeciras*, in *Spain*, in consideration of certain property having been transferred to them, to open a credit in his favour to the extent of $9400, and to honour his drafts to that amount. After advancing him some sums of money, they refused to accept a bill for $1000 drawn upon them by him, and subsequently refused to make any further advances. Proceedings in equity were thereupon commenced by him in the Supreme Court of *Gibraltar* to enforce a specific performance of the contract, and to obtain an award of damages under the 21 & 22 Vict. c. 27, for the non-performance of the contract :—

Held, that a Court of Equity will not decree the specific performance of a mere agreement to advance money. Moreover, that that being so, it has no jurisdiction to award damages. However, the Court of *Gibraltar* might have proceeded with the case as if it had been commenced as an action at law.

On its being contended that the cause of action would be merely the breach of an agreement to pay a sum of money, and that accordingly nothing could be recovered by way of damage but the principal money contracted to be paid and interest, it was

Held, that, inasmuch as the contract was a special one, whereby the firm became bound to honour, out of moneys agreed to be placed by them to his

* *Present* :—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

(1) The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this report.

credit, the drafts of *A. B.* up to a certain amount, he was entitled to general and substantial damages for the breach of it.

On its being questioned whether the Court of *Gibraltar* had jurisdiction in the case, it was

Held, that it had jurisdiction.

THE facts of this case are sufficiently set forth in the judgment.

The Respondent's claim in respect of various items of damage, alleged to have been incurred through the breach of the contract entered into with the Appellant, amounted to $29,062.6. The amount allowed by the assessors was $6075 :—

Item 1.—Claim for $15; amount allowed, $5. "Expense of protesting, and other expenses incidental to the dishonouring of the bill for $1000, and refusal of the Appellant to supply Respondent with further funds."

Item 7.—Claim for $1340; amount allowed, $670. "Loss at the rate of $2 per quintal on the sale of 670 quintals of cork to *Juan B. Porch*, which cork Plaintiff was forced to sell at a reduced price to raise money in consequence of the Defendant's breach of contract."

Item 12.—Claim for $500; amount allowed, $400. "Journeys to *Gibraltar* from *Algeciras* and back during this suit, and in relation thereto, to see and consult with the Plaintiff's legal advisers; expenses at the *King's Arms Hotel* during the hearing of the case, and payment to *Francisco Cevico* for his journeys from *Tarifa* to *Gibraltar* as Plaintiff's witness, and his loss of time, &c."

Item 13.—Claim for $8000; amount allowed, $5000. "For general damages for Plaintiff's personal discredit and other loss sustained between August, 1867, and June, 1870, in consequence of the Defendants' neglect and refusal to supply Plaintiff with the funds they had contracted to supply to the Plaintiff, and which they had in their possession in their then capacity as Plaintiff's bankers."

The *Solicitor-General* (Sir *G. Jessel*, Q.C.), and Mr. *H. Humphreys*, for the Appellant :—

The Supreme Court of *Gibraltar* has no jurisdiction with reference to a breach of this contract: *Allhusen* v. *Malgarejo* (1).

(1) Law Rep. 3 Q. B. 340.

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Moreover, the application is for the specific performance of an agreement to lend money. A Court of Equity will not decree the specific performance of an agreement of this kind: *Rogers* v *Challis* (1); *Sichel* v. *Mosenthal* (2). And where a suit for specific performance will not lie, a Court of Equity has no jurisdiction to award damages under the 21 and 22 Vict. c. 27: *Lewers* v. *Earl of Shaftesbury* (3). The Appellant's suit ought therefore to have been dismissed.

The interlocutory decree was, in effect, a declaration of what the Court considered to be due from the Appellant at the date of the decree, on the footing of the agreement. This decree declared that $1218 1*r*. 50*c*. was due from the Appellant to the Respondent. But the Appellant was entitled to the repayment of the $2500, with interest. Thus there was a balance in favour of the Appellant.

With regard to the amount of damages, there was no special contract, there was only a common agreement to lend money; and in such a case only the principal money, agreed to be paid, and interest can be recovered. The Respondent is not entitled to general damages in respect of the breach of the agreement.

Mr. *Rigby*, for the Respondent:—

The contract was something more than an agreement to lend money; there was an out and out conveyance of property with a proviso for re-purchase: *Williams* v. *Owen* (4); *Mellor* v. *Lees* (5); *Perry* v. *Meadowcroft* (6); *Alderson* v. *White* (7). The Appellant contracted to place the purchase-money to the credit of the Respondent, and to honour his drafts. The contract being of this character, a Court of Equity will entertain a suit for specific performance. Moreover, this is a case for damages under the 21 & 22 Vict. c. 27, and even without the aid of the Act: *Phelps* v. *Prothero* (8).

Even if a suit in equity would not lie, nevertheless the Supreme Court of *Gibraltar* administers both law and equity, and the pro-

(1) 27 Beav. 175.
(2) 30 Beav. 371.
(3) Law Rep. 2 Eq. 270.
(4) 5 My. & Cr. 303.
(5) 2 Atk. 494.
(6) 4 Beav. 197.
(7) 2 De G. & J. 97.
(8) 7 De G. M. & G. 722.

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cedure is much the same in both; the proceedings in equity would not be stayed, but the case would proceed as if it had been commenced as an action at law.

With regard to the damages, the contract was a special one, to place certain sums to the Respondent's credit and to honour his drafts up to a certain amount. He is therefore entitled to something more than the money agreed to be paid—to general damages for breach of the contract: *Marzetti* v. *Williams* (1); *Rolin* v. *Steward* (2); *Prehn* v. *Royal Bank of Liverpool* (3); *Boyd* v. *Fitt* (4); *Gee* v. *Lancashire and Yorkshire Railway Company* (5); *Adams* v. *Midland Railway Company* (6); *British Columbia Saw Mills Company* v. *Nettleship* (7).

The Supreme Court of *Gibraltar* has jurisdiction in a case of this kind: *Re Pollard* (8); *Durham* v. *Spence* (9).

[Reference was made to *Di Sora* v. *Phillips* (10); *Smith* v. *Gould* (11); *Pickering* v. *Stephenson* (12), as shewing the rules by which an English Court ought to be governed in construing a foreign contract.]

1873 *May* 3.

Their Lordships' judgment was now delivered by

SIR JAMES W. COLVILE:—

This is an appeal from the Supreme Court of *Gibraltar*. The Appellant is the surviving partner of a firm which carried on business at *Gibraltar* under the style of *Larios Brothers*. The Respondent is a Spaniard living at *Algeciras*, who, in 1867, was engaged in some kind of trade or business there, as an exporter of bark, cork, and other produce.

By the latest of the decrees under appeal, which bore date the 29th of June, 1870, and was the final decree in the cause, the Appellant and his late partner were ordered to pay to the Respondent the sum of 6095 hard dollars money of *Gibraltar* for special and general damages, in addition to the sum of $1218 1*r*. 50*c*.,

(1) 1 B. & Ad. 415.
(2) 14 C. B. 595.
(3) Law Rep. 5 Ex. 92.
(4) 14 Ir. C. L. Rep. 43.
(5) 6 H. & N. 211.
(6) 31 L. J. (Ex.) 35.
(7) Law Rep. 3 C. P. 506.
(8) Mont. & Ch. 239.
(9) Law Rep. 6 Ex. 46.
(10) 10 H. L. C. 624.
(11) 4 Moo. P. C. 21.
(12) Law Rep. 14 Eq. 322.

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awarded to the Respondent by an earlier and interlocutory decree, dated the 3rd of December, 1869, making in all the full sum of $7293 1*r.* 50*c.*, and also the taxed costs of the suit.

The appeal against this final decree was preferred in the ordinary way; and the Appellant afterwards obtained from Her Majesty in Council leave to include in his appeal the interlocutory decree of the 3rd of December, 1869.

By this last-mentioned decree the Chief Justice of the Supreme Court declared that, under the several contracts and agreements mutually entered into between the Plaintiff and Defendants, the Plaintiff was entitled to receive from the Defendants the two several sums or advances of $2500 and $6900, making together a total amount of $9400. He then stated an account by which it was made to appear that there remained due from the Defendants to the Plaintiff, on the balance of the said account, the sum of $1218 1*r.* 50*c.*, which he ordered the Defendants to pay to the Plaintiff within one month from the date of the service upon them of the order. And then, after reciting that the Plaintiff had sustained loss and damage by reason of the non-performance of the contract, and that the equities of the case were not sufficiently met by the above decree for specific performance, he ordered that it should be referred to the Assessors of the Supreme Court before the Court itself to inquire into and assess the damages so sustained by the Plaintiff.

A protracted inquiry subsequently took place before the Chief Justice and three assessors, which resulted in the assessment of the damages at the sum of $6075, and the final decree above mentioned.

The suit, therefore, was framed as an equity suit for the specific performance of an alleged contract, and for damages for the breach of it; the latter relief being obtained by proceedings similar to those which are had in the Court of Chancery under Lord *Cairns's* Act (1).

Before they consider the objections which have been taken to these decrees, and to the proceedings which lead to them, their Lordships will shortly review the transactions out of which the suit arose, in order to ascertain what was the true nature of the

(1) 21 & 22 Vict. c. 27.

contract between the parties, and what were the rights that flowed from it.

In June, 1867, the Respondent applied to *Larios Brothers* for a loan of money. There had been former transactions between them, and the amount of the balance due from him in respect of those transactions which had previously been the subject of dispute was in the course of the negotiation for the loan settled at $3337 4*r*. 50*c*. On the 30th of June, 1867, the Respondent and *Don Pablo Larios Herreros*, the then senior partner of *Larios Brothers*, appeared before a notary at *Algeciras* and executed three notarial instruments. By the first of these *Larios Brothers* bound themselves to advance by way of loan to the Respondent the sum of $2500, opening for him a credit in account current on their firm at *Gibraltar*, with interest at the rate of 6 per cent. per annum; he pledging to them by way of security his stock-in-trade, actual and future, and giving them power to inspect his books, so as to assure themselves of the right investment of the funds advanced. By this investment the Respondent also bound himself to settle the balance due on this account every three months and to pay the outstanding balance on demand.

The second instrument purported to be a sale to Messrs. *Larios Brothers* of certain landed property belonging to the Respondent in consideration of $2100 (of which the receipt was admitted); with a condition for the rescission of the sale, if within five years the Respondent should repay the consideration money, and a stipulation that, during the five years, the seller was to continue to receive the rents and other proceeds naturally arising from the property.

The third instrument, which was executed by the Respondent's wife, as well as by the before-mentioned parties, purported to be a sale by her to Messrs. *Larios* of certain property belonging to her in consideration of $4900 (the receipt whereof was also admitted) upon a like condition for rescission, and with a similar stipulation for the intermediate possession.

The first instrument, so far as it went, stated the true nature of the contract between the parties. Not so the other two. These were on the face of them conditional sales, for which the full consideration was admitted to have been paid. But, in truth, no money

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passed on either of them, and the real contract was that stated in paragraphs 4 and 5 of the Respondent's petition in the nature of a bill of complaint, and admitted by the fourth and fifth paragraphs of the plea and answer of the Appellant and his late partner; being in fact an agreement that Messrs. *Larios Brothers* should make further advances to the Respondent to the amount of $6900 dollars over and above the $2500 upon the security of the property comprised in the two instruments of conditional sale, debiting him with the old balance of $3373 4*r*. 50*c*. as part of such advances. A question was raised by the Respondent whether interest was chargeable on the $6900 when advanced, but their Lordships, considering the stipulations that the rents of the property comprised in the two deeds of conditional sale were to be received as before by the so-called vendors, have no doubt that the whole account was, as found by the Court below, to carry interest at 6 per cent.

Nor, after full consideration of the pleadings and evidence, and of the arguments addressed to them, do they find any reason to dissent from the conclusion of the Court below that the general effect of the arrangement was to impose upon the Defendants the obligation of opening a credit in favour of the Respondent to the extent of $9400, and of honouring his drafts to that amount less the old balance of $3374 4*r*. 50*c*. with which he was to be debited in account.

Between the 30th of July and the 4th of August, 1867, they had advanced to him the whole of the $2500, and sundry other sums; but there seems to be no reason to doubt that at the latter date, after debiting him in account with those advances, with the old balance, and with the interest on both, they had in their hands, undrawn, a balance of the $9400, which considerably exceeded the sum of $1000.

On that day they refused to accept a bill for $1000, drawn upon them by him in favour of one *Manuel Gomez*, and the bill was accordingly protested. This, and their subsequent refusal to make any further advances to him are the alleged breaches of the agreement in respect of which the Respondent brought the suit out of which this appeal has arisen.

In the course of the argument a question was raised whether

the Court at *Gibraltar* had jurisdiction to entertain any suit to enforce the contract between the parties. This objection, however, was hardly pressed; and it seems to their Lordships perfectly clear that, if the contract were such as is above stated, the breach of it was a cause of action arising in *Gibraltar*, where Messrs *Larios Brothers* carried on business, for which there was some remedy against them in the Supreme Court of that place.

More formidable objections have, however, been taken to the nature of the proceedings in the cause, and to the form and substance of the relief given by the two decrees.

First. It was argued that the suit was, on the face of the pleadings, a suit in equity for specific performance; that the Court of *Gibraltar*, in administering equity, was bound to follow the rules and course of practice of the Court of Chancery; that no suit for the specific performance of a mere agreement to advance or lend money would lie in the Court of Chancery; and that if the Court, considered as a Court of Equity, had not the power to decree a specific performance of the agreement, it had no jurisdiction to award damages for the breach of it. Mr. Solicitor-General cited *Lewers* v. *Earl of Shaftesbury* (1), in support of the last proposition; and the cases of *Rogers* v. *Challis* (2) and *Sichel* v. *Mosenthal* (3), in support of the last but one.

Second. It was pointed out that the interlocutory decree, though termed in the body of it a decree for specific performance, had really very little resemblance to an ordinary decree of that kind; but was, in effect, a declaration of what the Court found to be the obligation which lay upon the Defendants, in consequence of the agreement between the parties; a computation of what was due from them at the date of the decree on the footing of that agreement; and an order for the payment of the balance so found to be due. And it was argued that, inasmuch as the Defendants had thus become entitled, under the stipulations expressed in the first of the notarial instruments, and by reason of their demand at the expiration of the period of three months then mentioned, to the repayment of the $2500, with interest, this decree was erroneous, in that it omitted to set off this item, which would have turned the

(1) Law Rep. 2 Eq. 270. (2) 27 Beav. 175.
(3) 30 Beav. 371.

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balance in favour of the Defendants against the undrawn portion of the $9400.

Third. It was argued that the damages for the breach of the agreement, if assessable at all, were assessed on a wrong principle; and in particular that the two sums awarded by way of special damage were improperly awarded, and that the amount at which the general damages were assessed was excessive.

The chief part of Mr. *Rigby's* argument in answer to the first objection was directed to shew that the contract, so far as it related to the advance of the $6900 dollars, was one of sale, though of conditional sale, and was, therefore, properly made the subject of a suit for specific performance.

Their Lordships, however, are of opinion, that to this argument there are two answers which admit of no reply. In the first place, no suit could have been brought for the specific performance of the supposed agreements for conditional sales, since each of these transactions was, on the face of the written instrument, completed by an actual conveyance for a consideration admitted to have been paid and received; and, in the second place, the suit actually brought is not framed with the object of enforcing any such contract, or even with that of obtaining equitable relief, on the ground that the consideration, which in the notarial instruments is expressed to be paid, had not been really paid.

The parties throughout the negotiation which led up to the contract were stipulating for advances of money on one side, and for security for those advances on the other; the pleadings state and admit an agreement of that nature; and it seems impossible to treat the cause of action in this case as anything more than the breach of a contract to honour the drafts of the Respondent to the extent of the amount agreed to be advanced and placed to his credit. And, upon a full consideration of the arguments and the authorities, their Lordships are constrained to admit that the Court of Chancery would not have entertained a suit for the specific performance of such an agreement, but would have left the party aggrieved by the breach of it to seek his remedy, where he would find an adequate remedy, in a Court of Law.

But does it follow that, in the Court of *Gibraltar*, the Plaintiff, because he had misconceived his suit by making it one for specific

performance, was necessarily to be subjected to the consequences of having that suit altogether dismissed? That Court is not a mere Court of Equity, exercising jurisdiction over matters only of equitable cognizance. Nor is it even, like some of the Courts created by Royal Charter in *India* and other dependencies of the Crown, a Court having, under the terms of the Charter erecting it, different sides, and directed on its Equity side to govern itself by the course and practice of the High Court of Chancery; and on its Common Law side to exercise the jurisdiction and functions as near as may be of the Court of Queen's Bench. The *Charter of Justice* by which the Supreme Court of *Gibraltar* was created, directs generally that the Court shall have cognizance of all pleas, and jurisdiction in all causes, whether civil, criminal, or mixed, arising within the garrison and territory, with jurisdiction over all subjects of the Crown and all other persons whatsoever residing and being within the said garrison and territory, save as thereinafter is excepted. It further provides that all questions there arising are to be judged and determined according to the laws then or thereafter to be in force within the garrison and territory, that the trial of criminal cases is to be by the Judge and a jury of twelve; and that all issues of fact arising in civil suits or actions are to be tried by the Judge and three assessors, the verdict of the Judge and assessors to be according to the majority of votes; or, if they are equally divided, according to the opinion of the Judge.

It also contains a provision which gave to the Judge large powers of framing rules touching the forms and manner of proceeding to be observed in the Court, and the practice and pleading upon all actions, suits, and other matters both civil and criminal.

Under this latter power Mr. Baron *Field*, the first Judge of the Court, made certain rules, which were duly allowed by the Crown on the 1st of October, 1832. By the 10th of these it was provided that the civil practice of the Court, whether in its legal or equitable jurisdiction, should be simply by petition, answer, or demurrer, and (if necessary) replication or joinder in demurrer, and rejoinder, addressed to the Judge of the Court. Other rules provided one uniform process for compelling an appearance and for executing the decrees or judgments of the Court; the only rule which seems to contemplate any distinction between a suit for equitable relief

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and an action to enforce a strictly legal right, or to point to any difference of procedure in the two cases, being the 17th, which is in the following terms:—

"In the case of equitable suits, the Defendant's answer shall be put in upon oath, and the rest of the practice in such suits shall be conformable to that of the High Court of Chancery in *England*, except that the evidence of the witnesses shall be taken before the Court *vivâ voce*, at the hearing; that inquiries, which in *England* would be referred to a Master in Chancery, shall be made before the Court; and that issues of fact, when directed by the Court, shall be tried by the Judge with assessors or a jury."

There is, therefore, nothing in the constitution of the Court, or in the rules which govern it, to compel it to relegate a party who had mistaken his remedy, and had sought equitable relief in a matter not properly within the cognizance of an English Court of Equity, to another tribunal, or to send him from one side of the Court to another. It seems rather to be a Court that already possesses the power which modern legislation is seeking to attribute to our own Superior Courts, of administering to the fullest extent both law and equity in any cause of which it may be seised; though, in administering law, it may be bound to adopt and follow the principles which govern English Courts of Law; and in administering equity, to adopt and follow the principles which govern English Courts of Equity. From this it seems to follow that had the objections taken to the suit as a suit of specific performance, on the argument of this appeal, been taken by demurrer or otherwise in the Court below, that Court would not have been bound to hold its hand for want of jurisdiction, but might, amending the pleadings if necessary, have caused the subsequent proceedings in the suit to be had as if the suit had been originally an ordinary action for damages sustained by reason of a breach of contract.

It is desirable, with reference both to the second and third of the objections above stated, and to the question what their Lordships ought to do upon this appeal, to consider what would have been the proper result of the proceedings if the course suggested had been taken in the Court below. The damages awarded would necessarily have constituted the whole of the relief obtainable by

the Respondent, and the first question, therefore, is what is the proper measure of damages to be applied to such a case.

It was argued for the Appellant that the cause of action being merely the breach of an agreement to pay a sum of money, nothing could be recovered by way of damage, except the principal money contracted to be paid, and interest. On the other side it was contended that this case fell within the principle established by or recognised in such cases as *Marzetti* v. *Williams* (1); *Rolin* v. *Steward* (2); *Prehn* v. *Royal Bank of Liverpool* (3); and others; and that the contract being a special one, whereby the Defendants became bound to honour, out of moneys agreed to be placed by them to his credit, the drafts of the Plaintiff up to a certain amount, the Plaintiff was entitled to general and substantial damages for the breach of it. Their Lordships are of opinion that this latter contention is correct. No question arises with reference to the first of the notarial instruments, since it appears that the whole of the $2500 were advanced, and afterwards became repayable. But the agreement for the further advance of $6900 was one whereunder, in consideration of the promise to advance, the Plaintiff had executed one and induced his wife to execute the other of the two conditional sales, each admitting in a binding manner, as is shewn on the face of the instruments, that the whole of the consideration money had been actually paid. The result of that transaction was, therefore, to confer irrevocably upon the Defendants all the rights over the property comprised in the two instruments which the law of *Spain* might give them; and it is reasonable to presume that the parties intended to treat the consideration money, of which the payment was so acknowledged, as remaining in the hands of the Defendants, just as if it had been a sum paid into their house, standing in their books to the credit of the Plaintiff, and to be drawn upon by him in the same manner as the $2500 to be advanced under the first of the notarial instruments.

The question, however, remains whether, even upon this view of the Plaintiff's rights, the damages have been correctly assessed. Their Lordships are of opinion that the sums of $670 and $400, which the assessors awarded to the Plaintiff under the 7th and 12th

(1) 1 B. & Ad. 415. (2) 14 C. B. 595.
(3) Law Rep. 5 Ex. 92.

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items of his amended claim for special damages were improperly awarded. As to the first, they entirely concur with the learned Chief Justice, who in his charge to the assessors ruled that the full market value of the cork at *Algeciras* on the day of the sale must on the evidence be taken to have been realised, and that any extra price which the Plaintiff might possibly have obtained for it in a foreign market, had he had the funds to export it, was uncertain, speculative, and remote. In fact, he failed to prove on this item that he had actually sustained a loss, so that the question whether the Defendants could be reasonably taken to have contemplated such damages when they made the contract never arose. And the 12th item appears to their Lordships to consist of sums which may or may not be allowable in the taxation of costs; but which, if recoverable at all, are recoverable as costs, and not as damages.

If these items are struck out, the only item of special damage left would be the small sum of $5 allowed for cost of protest, &c., and the case stands pretty clear of the questions raised and considered in *Hadley* v. *Baxendale* (1), and very recently by the Exchequer Chamber in the case of *Horne* v. *Midland Railway Company* (2).

The only remaining question is whether the general damages amounting to $5000 were so excessive as to call for any interference on the part of their Lordships. That question ought, they apprehend, to be determined by the principles which would guide a Court of Law, sitting in Banco, in controlling the discretion of a jury. It is to be observed that this sum does not represent the whole amount of the damage to be recovered by the Plaintiff in respect of the breach of contract, less the items of special damage, because it does not include the amount remaining at the Plaintiff's credit in the hands of the Defendants. As general damages sustained by the Plaintiff by loss of credit, the sum in question appears to their Lordships on the evidence in this case to be excessive; and in truth the effect of the circuitous proceedings in the Court below is substantially to assess the damages payable by the Defendants for their breaches of contract at the gross sum decreed against them by the final decree, viz. $7293 1*r.* 50*c.*

Their Lordships have next to consider how far the proceedings

(1) 9 Ex. 341. (2) Law Rep. 8 C. P. 131.

in the Court below are affected by the question raised by the second objection, touching the liability of the Plaintiff to repay the advance of the $2500 with interest. The Defendants appear to have been allowed the interest on these advances up to the date of the interlocutory decree in the computation of the balance remaining in their hands. But it seems clear that they have not received credit for the principal moneys or the subsequent interest thereon, and that in respect thereof they would, if the final decree were to stand, still have a counter-claim against the Plaintiff. The liability of the Plaintiff to repay these advances had not accrued when the Defendants broke their contract by refusing to accept the bill, nor when the suit was commenced, nor until the 5th of December, when they first made their demand pursuant to the first notarial instrument. It had, however, accrued when they had filed their answer, and is thus asserted in the third paragraph of that answer: "And these Defendants say that they have made up their accounts with the Plaintiff in respect of the said credit of $2500, which sum had been paid by the Defendants to the Plaintiff in different instalments, which, with interest, amounted in all to the amount of $2534 1*r.* 18*c.*; that they demanded payment thereof, as entitled to, by the terms of the said agreement; and they say that, by making default in payment of the said sum of $2534 1*r.* 18*c.* the Plaintiff has committed a breach in the terms of the said instrument in writing recited in the third paragraph of his petition."

It may be conceded that, in an equity suit to take the account between the parties and ascertain the balance due to either on the footing of the agreements between them at the date of the final decree, this item ought to have been brought into the account; although, if the Plaintiff had asserted his claim, as the principal argument for the Appellant assumes he ought to have asserted it, by an action at law, this counter-claim, which, when the action was commenced, had not even ripened into a debt, could not have been pleaded by way of set-off to damages which were in their nature partially, at least, unliquidated.

Their Lordships, having regard to the objections, both of substance and form, which have been taken to the proceedings in the Courts below, have felt considerable difficulty as to the advice which it will be their duty to give to Her Majesty on this appeal.

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It was pressed upon them that they ought to dismiss the suit altogether; and even at the close of his reply the Solicitor-General seemed still to contend for the dismissal of the Plaintiff's claim for relief, though he was willing that, under the power reserved by Her Majesty's Order on the petition for special leave to appeal, an Order should be made allowing the Plaintiff to redeem the properties comprised in the two deeds of conditional sale on payment to the Defendants of what may be due to them in respect of their advances.

But it is obvious that, if the Plaintiff had, as their Lordships think he had, a good cause of action, a dismissal of the suit, on the ground that he had mistaken his remedy, would be most unjust and improper, unless it left him at liberty to seek the proper remedy in a new suit, and thus to re-open the whole litigation between the parties.

And their Lordships, having regard to the general jurisdiction of the Court below, and to the fact that the objection to the form of the suit, as one for specific performance, seems never to have been taken in the Court below, are of opinion that it is their duty, in the interest of both parties, to do justice between them in this suit.

Considering all the circumstances of the case, and the liberty reserved by the order giving special leave to appeal against the interlocutory decree of the 3rd of December, 1869, they are of opinion that full justice between the parties might be done in the following manner:—They would reduce the amount awarded to the Plaintiff for general damages to $2500. That sum, added to the sum of $1218 1*r.* 50*c.*, which has been found to be the balance undrawn on the 3rd of December, 1869, and to the $5, the costs of protest, would make the gross amount of damages recoverable by the Plaintiff $3723 1*r.* 50*c.* But against that amount the Defendants ought, in their Lordships' opinion, to be allowed on equitable grounds to set off the $2500 repayable to them, thereby reducing the amount, for which the Plaintiff is entitled to judgment, to $1223 1*r.* 50*c.*, with the costs of the suit. The order to be made on this appeal should accordingly declare that the Plaintiff is entitled to retain his judgment for that sum and the costs of the suit, and should direct that, in the event of the Plaintiff or his

wife being willing to redeem, an account be taken between the parties of what is due from the Plaintiff to the Defendants for principal and interest in respect of their advances, giving credit therein to the Plaintiff for the amount due to him in respect of his said judgment debt, with interest thereon since the 3rd of December, 1869, the date up to which interest has been calculated and allowed (the interest on both sides of the account being calculated at the rate of 6 per cent. per annum), and also giving credit to him for the rents (if any) of the properties comprised in the two instruments of conditional sale, or either of them, which have been received by the Defendants; and should further order that, upon payment to them of the balance to be found due within six months after the date of the ascertainment of such balance, together with the costs of taking the said account, and of the other proceedings to be had in the Court below for the purpose of such redemptions, the Defendants do re-convey to the Plaintiff and his wife their respective properties; and declare that, in default of such payment, the Defendants will be entitled absolutely to retain all the rights which the law of *Spain* may have given to them in such properties under the instruments of conditional sale, the Plaintiff being, on his side, at liberty to take out execution for the amount due to him in respect of his judgment debt.

They feel, however, that such an Order as that suggested could only be made by consent of the Plaintiff. If he does not consent to it, their Lordships are of opinion that they must humbly advise Her Majesty to reverse the two decrees under appeal; to declare that, by virtue of the agreements subsisting between the parties, the firm of *Larios Brothers* was bound to open a credit in favour of the Respondent and to honour his drafts to the extent of $9400; and that, on the 4th of August, 1867, they had in their hands undrawn on account of the said credit a balance exceeding the amount of the bill then dishonoured; and to direct that a new trial be had before the Chief Justice and three assessors, in order to ascertain what damages have been sustained by the Plaintiff by reason of the Defendants' breaches of their said agreement, such damages to cover the whole of the amount recoverable by the Plaintiff. If this course be pursued, their Lordships, having regard to the pleadings and to the general jurisdiction of the

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Court, think that the Defendants ought to have the benefit, by way of set-off, of their counter-claim in respect of the $2500 and interest; and that they should be left to assert, in such manner as may be open to them, their rights under the two instruments of conditional sale.

Their Lordships think that there should be no costs of this appeal. The costs below must be dealt with by the Supreme Court of *Gibraltar*.

Solicitors for the Appellant: *Johnson & Weatheralls.*
Solicitors for the Respondents: *Cole, Cole, & Jackson.*

J. C.* 1873 *Feb.* 6, 7, 9; *March* 1.

CHARLES LECLÈRE, GEORGE S. LECLÈRE, ELMIRE LECLÈRE, WIFE OF CHARLES NELSON, AND THE SAID CHARLES NELSON, P. ÉDOUARD LECLÈRE, VICTORINE LECLÈRE, WIFE OF BOUCHER DE LA BRUÈRE, AND THE SAID BOUCHER DE LA BRUÈRE, ALBERTINE LECLÈRE, WIFE OF ALPHONSE RAYMOND, AND THE SAID ALPHONSE RAYMOND, AND FRANCIS LECLÈRE . . . . . } APPELLANTS;

AND

JEAN LOUIS BEAUDRY . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE) (1).

Old Law of Lower Canada—Power of Sale by Usufructuary—Formalities—Construction of Document.

The usufruct of land in *Lower Canada* was given by deed of gift to *A.* during his life, and after his death the deed gave the property in substitution to his children, with a limitation over in case he died without children; and

* *Present*:—THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, THE LORD JUSTICE MELLISH, and SIR MONTAGUE E. SMITH.

(1) N.B.—The MS. notes of the late Mr. *Moore*, Q.C., have been used in the preparation of this case.

power was given to *A.* to sell the land for a rent-charge if it should be judged by experts to be advantageous to his children :—

Held, that such power could be exercised without the sanction of any judicial authority.

A. having a power of sale under the circumstances above-mentioned, sold his life interest in the usufruct to *B.*, and subrogated *B.* in all his rights under the deed of gift :—

Held, that the power to sell the land for a rent-charge, conferred on *A.* by the deed of gift, had not been extinguished by the sale to and subrogation of *B.*

A person, having already power under a deed of gift to sell land, applied to a Court for authority to sell the land, which the Court granted, annexing a condition not required by the donor :—

Held, that this part of the decree could at most be considered as directory only, and not as imposing a condition which rendered the sale void if it were not complied with.

A deed of gift conferred the usufruct of land in *Lower Canada* on *A.* during his life, and after his death gave the property in substitution to his children, with a limitation in the following terms : "*et dans le cas de mort du dit donataire sans enfants la jouissance et usufruit des biens à lui présentement donnés seront réversibles à ses frères et sœurs ou à aucun d'eux, pour par eux en jouir leur vie durante ; et si au décès du dit donataire sans enfants tous ses frères et sœurs étaient décédés la propriété des dits biens retournera et appartiendra à leurs enfants nés et à leurs enfants nés et à naître, pour être partagés entre aux par souches. . . .*"

The donor died. The donee died without children, having survived all his brothers and sisters, three of whom died leaving children, viz., *C.*, who died before the date of gift, and *D.* and *E.* who died after that date :—

Held, that the children of *C.* were entitled to one-third of the property comprised in the deed.

Semble, that by the old law of *Lower Canada*, where there is a gift of the usufruct of land for life, and a substitution with power to the usufructuary himself to sell the land, if experts deem it advantageous to the substitution ; the appointment of a tutor to the substitution is not required, and if he be appointed his functions are limited to having the experts duly appointed, and it is not necessary to consult him as to the management of the sale.

THE object of this appeal was to establish the validity of the sale of certain lands in the city of *Montreal*.

By a deed of gift, dated the 14th of May, 1827, *Marie Josephte St. Germain* or *Gauthier*, widow of *Jean Baptiste Castonguay*, gave (among other lands) a certain orchard at *Montreal*, part of which was the property in question in the appeal, to her son, *François Xavier Castonguay*, as usufructuary for his life, and after his death she substituted his children to be born in lawful matrimony as proprietors, but she declared that, in case he should die without

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children, the enjoyment and usufruct should revert to his brothers and sisters or any of them, to be enjoyed by them during their life, and that if at the time of the decease of the donee without children all his brothers and sisters should be dead, the property should go and belong to their children born and to be born in lawful matrimony, and be divided among them *per stirpes*. By the same deed the donor charged the donee and his children, substituted as aforesaid, with the payment to her of an annuity of £25 Canadian currency for her life, and declared that the gift thereby made was made on condition that the donee should not be able to convey to any stranger (*à aucune personne étrangère*) the enjoyment and usufruct of the lands, but should be obliged to receive the fruits and revenues of them for his own proper benefit, and none of his creditors should be able to seize such fruits and revenues; also that the donee should have power to sell, but only in consideration of a rent-charge, all or part of the orchard, if it should be thought by experts to be advantageous for his children; and by the said deed certain rights, which it is not necessary particularly to mention, were given to the widows of usufructuaries.

The exact terms of these gifts were as follows:—

"*Et la dite dame donatrice désirant* conserver aux enfants *à naître en légitime mariage du dit donataire seulement* la propriété pleine et entière *des biens ci-dessus désignés, sans l'étendre à un degré plus éloigné, veut et entend que les biens ci-dessus donnés en jouissance au dit donataire demeurent substitués comme elle les substitue par ces présentes aux dits enfants à naître en légitime mariage du donataire seulement auxquels elle donne la propriété des dits biens, ce qui a été accepté pour eux par le dit donataire leur père voulant et entendant que ceux qui sont appelés à la présente substitution soient saisis des biens ainsi substitués aussitôt que le cas de la substitution sera avenu, sans qu'ils soient obligés d'en faire demande en justice; et dans le cas de mort du dit donataire sans enfants la jouissance et usufruit des biens à lui présentement donnés seront réversibles à ses frères et sœurs ou à aucun d'eux, pour par eux en jouir leur vie durante; et si au décès du dit donataire sans enfants tous ses frères et sœurs étaient décédés la propriété des dits biens retournera et appartiendra à leurs enfants nés et à leurs enfants nés et à naître, pour être partagés entre eux par souches. . . .*

"*La présente donation encore faite aux charges, clauses et conditions ci-après exprimées, savoir, que le dit donataire* ne pourra transporter *à aucune personne étrangère la* jouissance et usufruit *des dits biens pendant le temps de sa jouissance, mais qu'il sera tenu d'en percevoir les fruits et revenus pour son propre bénéfice et avantage sans pouvoir les dits fruits et revenus être saisis par aucun des créanciers du dit donataire ; que le dit donataire pourra vendre à constitution de rente seulement le tout ou partie du terrain complanté d'arbres fruitiers désigné en ces présentes si par experts et gens à ce connaissants c'est jugé avantageux pour ses enfants.*"

The donor died in 1843, and the donee died in 1861 without children, and having survived all his brothers and sisters, of whom he had four. One of these, *Benjamin*, died in 1819, before the date of the deed of gift, leaving three children. The other three brothers and sisters of the donee were *Jean Baptiste*, who died in 1849, leaving six children; *Marie Julie*, who married *Luc Dufresne* and died in 1836 without children; and *Marie Josephte*, who married *Pierre Édouard Leclère* and died in 1861, leaving seven children.

The donee, in March, 1844, presented a petition to the Court of Queen's Bench for the district of *Montreal*, stating his desire to exercise the power of sale conferred on him by the deed of gift, and that before doing so it was necessary to establish by experts that it would be advantageous that the land should be sold, and praying that a family council might be assembled, to give their advice as to the appointment of a guardian of the substitution, who might act on behalf of the substituted persons in the nomination of experts.

A family council was assembled pursuant to the said petition, and their votes being equally divided between *Joseph Castonguay*, one of the six children of the said *Jean Baptiste Castonguay* and another person, the Court, on the 14th of May, 1844, appointed the said *Joseph Castonguay* guardian of the substitution.

The donee in September, 1844, commenced in the same Court an action against the guardian so appointed, by the declaration in which, he stated the refusal of the said guardian to name an expert for the purpose mentioned in the deed of gift, and prayed

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that it might be declared that under that deed he had the right to sell the whole or part of the orchard in consideration of a rent-charge, if it was thought by experts to be advantageous for his children, and that the Defendant might be decreed to name an expert to act with one to be named by the Plaintiff, in deciding whether it was advantageous for the children of the Plaintiff or the other persons called to the substitution, that the land or a part of it should be sold in consideration of a rent-charge, or that in case the Defendant should fail to name an expert, pursuant to such decree, one might be named by the Court to act as aforesaid with the one to be named by the Plaintiff, and that such experts might make their report to the Court, and such order be pronounced thereon as law and justice should require.

The Defendant, the guardian, pleaded that as the Plaintiff, the donee, had no children, he could not claim the appointment of experts to judge whether the sale of the orchard for a rent-charge would be advantageous, and that in any case those persons called to the substitution who had attained their majority ought to have been summoned as Defendants.

The Court overruled these pleas on the 28th of November, 1845, and on the 29th of January, 1846, ordered the appointment of experts who should report whether it was advantageous for the children of the Plaintiff or any other persons who might take under the substitution in the deed of gift, that all or part of the orchard should be sold for a rent-charge: and the Plaintiff and Defendant respectively then appointed experts, who reported in the affirmative.

By its judgment, pronounced on the 13th of October, 1847, the Court approved the report, and considering that the Plaintiff then had the right to exercise the power of sale, with observance of the required forms, adjudged and ordered that the Plaintiff, by virtue of the deed of gift, had the right to sell all or part of the orchard for a rent-charge, a valuation having previously been made of the whole or part, as the case might be, by the experts who should be named by the parties, or that failing, by a Judge at the Plaintiff's request; and condemned the Defendant, in his quality of guardian, to pay the costs of the action.

The Defendant appealed, and on the 10th of March, 1857, the

Court of Queen's Bench of *Lower Canada* affirmed the judgment, with costs against the Appellant in his quality of guardian.

By a deed of sale, dated the 22nd of April, 1857, the donee, *François Xavier Castonguay*, conveyed his usufruct in the orchard, with reservation of the rights under the deed of gift of his wife in case of her widowhood, to his brother-in-law, the said *Pierre Édouard Leclère*, for nine undivided tenths, and to *Olivier Garceau* for the other undivided tenth; and by a deed, dated the 15th of May, 1857, in order to supply an omission in the deed of sale, he subrogated the said *Pierre Édouard Leclère* and *Olivier Garceau* in the same proportions in all his rights, whether under the deed of gift with the aforesaid reservation, or under the said judgments of the 13th of October, 1847, and the 10th of March, 1857, with power to them to put those judgments in execution in his name as they should think fit. The said *Olivier Garceau* was the husband of *Marie Tarsille Castonguay*, a daughter of *Jean Baptiste Castonguay*, the brother of the donee.

Before the execution of the two last-mentioned deeds the donee had appointed *Daniel Gorrie* as his expert for the execution of the judgment of the 13th of October, 1847, and had applied to the Superior Court at *Montreal* to appoint another expert in case one should not be immediately appointed by the guardian; and these proceedings being followed up by *Pierre Édouard Leclère* and *Olivier Garceau*, in the name of the donee, and the guardian having made default in the appointment of an expert, the Court appointed *Joseph Boulanget* as expert on his side, and directed the experts to report to the Court without delay.

The experts reported that the orchard was worth £5,000 Canadian currency, and the Superior Court homologated or approved their report on the 20th of June, 1857.

It proved difficult to sell the orchard in one lot, and thereupon a further petition was presented to the Superior Court in the name of the donee for a valuation in lots, as shewn on a plan annexed to the petition; and the guardian having appeared in person and declared that he referred himself to the Court (*qu'il s'en rapporte à justice*), the Court, on the 24th of July, 1857, again appointed *Joseph Boulanget* expert for the guardian; and he, with *Daniel Gorrie* as expert for the donee, made a report, dated and filed in

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the cause on the 30th of July, 1857, by which the said lots, twenty in number, were valued in separate sums, amounting in the total to £5,000. This report does not appear to have been submitted to the Court for homologation.

Marie Julie Castonguay (or *Dufresne*) being already deceased, without children, as hereinbefore mentioned, it was at this time evident that the property in the orchard, subject to the respective usufructs of the donee, or of *Pierre Édouard Leclère* and *Olivier Garceau*, as his assigns, and of *Marie Josephte Castonguay* (or *Leclère*), also subject to the possibility that the donee might have children, was divisible either into moieties for the families of *Jean Baptiste Castonguay* and *Marie Josephte Castonguay* (or *Leclère*), or if upon the true construction of the instrument the family of *Benjamin Castonguay* were entitled to share in it, notwithstanding his decease before the date of the deed of gift, then into thirds.

By three deeds, two dated the 24th and one the 28th of July, 1857, the three children of *Benjamin Castonguay* conveyed their expectations under the said deed of gift of the 14th of May, 1827, and also under another deed of gift (with which the appeal had no connection) to the Respondent *Beaudry* and *François Guenette*, who thereby became entitled to one third of the property in the orchard, subject to the question of construction, and subject in any case to the above-mentioned usufructs. In the last of those three deeds the vendor expressly stipulated that the purchasers should have no recourse against him if the question of the construction of the said deed of gift should be adversely decided; but the other two deeds were so expressed as to lead to the same result, the vendors merely selling their rights, whatever they were. The price named in each of the three deeds was only £100 currency, and therefore extremely inadequate, as the value expectant on the deaths of *François Xavier Castonguay*, then aged sixty-nine, and *Marie Josephte Castonguay* (or *Leclère*), then aged fifty-four, of one-ninth part of numerous properties, one of which, the orchard, had been valued at £5,000.

After acquiring this title the Respondent and *François Guenette*, on the 30th of July, 1857, gave notice to *Pierre Édouard Leclère* and *Olivier Garceau*, as assignees of *François Xavier Castonguay's*

usufruct, not to proceed with the sale of the orchard without their consent, and without summoning them, and on the next day they gave notice to *François Xavier Castonguay*, as empowered both by the deed of gift and by the judgment of the 13th of October, 1847, not to proceed with the sale of the orchard without having given them information of the intended sale, or without observing the forms which they described as being required according to usage, viz., "*que les lots qu'il aura l'intention de vendre soient annoncés à la porte de l'Église paroissiale de Montréal pendant trois Dimanches consécutifs, et adjugés le troisième Dimanche, ou un jour subséquent (suivant qu'il aura été annoncé par l'avertissement de la vente qui devra être affiché à la porte de l'Église paroissiale, dès le premier Dimanche de l'annonce), au plus haut et dernier enchérisseur, pourvu que ce ne soit pas pour un prix moindre que celui de l'estimation du lot ou des lots que l'on aura l'intention de vendre, et qui doit être préalablement faite par les experts assermentés et nommés de la manière indiquée dans le dit jugement.*"

In pursuance of the rights to which he had been subrogated as aforesaid, but with the concurrence of *François Xavier Castonguay*, *Pierre Édouard Leclère* caused the orchard to be sold in lots by auction on the 1st of September, 1857, having first caused proper particulars and conditions of sale to be prepared, and observed all the forms by proclamation at the church door and otherwise, which, in the last-mentioned notice of the Respondent and *François Guenette*, were described as being required by usage. The biddings were in gross sums, in order to satisfy the requirement of the deed of gift that the sale should be for a rent-charge. It was one of the conditions of sale that the purchasers should retain the entire price, and pay 6 per cent. per annum on it by way of rent-charge to *Pierre Édouard Leclère* and *Olivier Garceau* until the death of *François Xavier Castonguay*, and afterwards to the persons entitled. The sale was well attended and all the lots were sold. Six lots, valued at sums amounting to £1300, were among other things bought in one lump by *Pierre Édouard Leclère* at the price of £1000. The whole twenty lots brought £6442, against a valuation of £5000, and the produce of the sale was afterwards brought up to £6742, as *Pierre Edouard Leclère*, in the conveyance to him of the six lots which he had bought together for

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£1000, consented that their price should be fixed at £1300, the amount of their valuation.

The case in which this appeal was brought arose out of the sale of the said six lots. *Pierre Édouard Leclère* re-sold one of them to *John Short*, against whom, after the deaths of all the usufructuaries, under the deed of the 14th of May, 1827, he obtained judgment in an action for debt, and the sheriff having advertised the lot for sale under that judgment, the Respondent *Beaudry* filed an Opposition to such sale, claiming a third of the property in the orchard under the three conveyances from the children of *Benjamin Castonguay*, coupled with a conveyance to him by *François Guenette*, dated the 16th of March, 1863, of the interest of the latter under the said three conveyances, and a twenty-first part of the same property under a conveyance to him, dated the 10th of October, 1862, by *Charles Alfred Napoléon Leclère*, one of the seven children of *Marie Josephte Leclère*, and a ratification of that conveyance by the wife of *Charles Alfred Napoléon Leclère*, dated the 16th of October, 1862.

In the course of the pleadings the Respondent (as Opposant in the action) alleged the invalidity of the titles to *Leclère* and to *Short*, of the 14th day of September, and 2nd of November, 1857, respectively; the inalienability of the usufruct by *François Xavier* to *un étranger;* and the unjust obtaining by *Leclère* of the deeds of sale and subrogation of the 22nd of April, and 15th of May, 1857, from *François Xavier*. He also objected the nullity of the proceedings adopted to effect the sale subsequent to the date of the deed of subrogation, namely, the estimate of the 30th of May, and its subsequent homologation in June, the petition and order thereon of the 24th of July following, with the divisional valuation by the experts of the 30th of the same July, the preparatory proceedings for the sale of the lots and the sale itself; all which he characterised as conducted and made by *Leclère* fraudulently, and without the consent of or notice to the tutor of the substitution, together with alleged frauds practised by *Leclère*, in keeping away bidders, and his purchase of the said six lots at low rates, less than their value; their adjudication to him collectively instead of separately, at less than their divisional valuation prices; and, finally, the nullity of the deeds of sale to *Leclère* of the 14th day of September, 1857, and

of his deed of sale to the Defendant of the 2nd of November, 1857, whereby no property in the lot passed to *Short*, whose lot was therefore seized *super non domino*, and thereupon finally the Opposant stated his breach and conclusions in the following terms:—"*Il résulte des prémisses* que les procédés adoptés par le Demandeur actuel après les actes de cession et subrogation qu'il a obtenus du dit François Xavier Castonguay comme susdit sont nuls *de plein droit, et doivent être considérés comme non avenus. A ces causes, le dit Opposant* conclut à ce que tous et chacun des procédés adoptés par le Demandeur actuel postérieurement aux actes de cession et de subrogation sus-mentionnés, et notamment après l'acte de subrogation du 15 Mai 1857, *le prétendu acte de vente par le donataire François Xavier Castonguay au Demandeur actuel du* 14 *Septembre* 1857, *et le prétendu acte de vente par le Demandeur actuel au dit Défendeur, John Short, en date du* 2 *Novembre* 1858, *invoqué dans les moyens de contestation du dit Demandeur*" be held to be void and null, the whole with costs.

Leclère, besides stating formal objections to the suit, replied specially that the adjudication and sale of the lots had been made in conformity with the said judgments thereon and the practice of the Court, and that all the required formalities for the sale of the 1st of September had been observed; that the divisional report of experts did not require homologation; that under the terms of the deed of donation, it was not necessary even to obtain judgment to authorize the sale; and that the Opposant had recognised its regularity and validity by his presence and bidding thereat.

On the 20th of February, 1866, the parties were heard on the merits of the Respondent's opposition before Mr. Justice *Monk*, who, on the 31st of December, 1866, pronounced a judgment, the material parts of which are in the following terms:—

"The main considerations of the judgment were that the report of experts was never sanctioned, homologated, or approved by the Court: that no *cahier des charges* or conditions of sale of the said real estate was ever submitted to or sanctioned by the Court, or ever notified to the tutor to the substitution, and that no legal notice or conditions of the contemplated sale were ever made to the public, to the Court, or to the tutor; that for the reasons aforesaid, the pretended sale and adjudication of the said real estate

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made on the 1st of September, 1857, was null and void, and that whereas in and by the aforesaid report of experts it was reported and declared that the said real estates should all be sold in separate lots at fixed prices, yet the Plaintiff, *Leclère*, purchased the lots *en bloc*, together, and not separately, and for one sum for the whole, and not for a particular sum for each lot; and under the price fixed by the experts: that the *vente de jouissance* made by the said *François Xavier Castonguay* to the Plaintiff and *Olivier Garceau*, dated the 22nd of April, 1857, and the deed of sale and subrogation, dated the 15th of May, 1857, and the deed of sale, dated the 14th of September, 1857, were null and void in law, and did not confer any right of usufruct or of property upon the said *Leclère* or the said *Garceau*, the said *jouissance* being inalienable by the said *François Xavier Castonguay*, and the aforesaid real estate being substituted in favour of persons and parties not represented legally or otherwise in the said deeds of the 15th of May and the 14th of September. That the Opposant had proved by legal and sufficient evidence the material allegations of his opposition.

The Court consequently declared the said Opposant, *Jean Louis Beaudry*, the true and lawful owner and proprietor of one-third and one twenty-first undivided part ("*d'un tiers et un vingt et unième indivis*") of the lot or parcel of land and premises seized in the cause under and in virtue of the aforesaid writ of execution, and as mentioned or described in the *procès-verbal* of said seizure, and granted *main-levée* to the said Opposant of the seizure of said one-third and one twenty-first undivided part of said lot or parcel of land and premises, with costs against Plaintiff contesting.

The judgment was accompanied with remarks by the learned Judge, from which the following is an extract:—

"As to the question of the homologation of the second report, the Court finds difficulty in holding it to be necessary *à peine de nullité*. It is not easy to see why an action was necessary at all by *François Xavier Castonguay*. The donation gave a right to sell on constitution *de rente*, after the report of experts was made, and why should he bring a suit? Nevertheless, he did sue, and the Court ordered the sale after certain formalities; it homologated the first report, and if the legal donee took proceedings he was bound to

carry them out, and have the second report homologated also, and the new terms and conditions of sale sanctioned by the Court. This is the opinion I have arrived at.

"In the next place, the tutor to the substitution does not seem to have been consulted as to the conditions of sale, nor to have been present at the sale. This alone is fatal to the proceedings. In the next place, *Leclère* bought six lots *en bloc*, which was also irregular. So that *Leclère* acquired nothing under the sale nominally made, and his titles must be declared invalid and be set aside.

"As to frauds set up by *Beaudry* as having been practised by *Leclère*, they have not been proved. There was a looseness in his proceedings, and irregularity in the particulars referred to, but no such intention as is imputed to him."

The Plaintiff, *Pierre Édouard Leclère*, had died during the pendency of the suit in the Superior Court, and the Appellants, as his universal residuary legatees, appealed to the Court of Queen's Bench, where the appeal was heard on the 3rd and 4th of June, 1869, before five Judges; and on the 9th of December, 1869, the judgment of the Superior Court was affirmed with costs, by a judgment in which three Judges concurred, namely, Justices *Caron*, *Drummond*, and *Loranger*, Mr. Justice *Badgley* dissenting. It afterwards appeared that Chief Justice *Duval*, who heard the argument, but was prevented by illness from assisting at the judgment, also dissented.

The reasons of the majority of the Court of Queen's Bench are stated as follows, in the notes of Justice *Caron*, to which Justices *Drummond* and *Loranger*, who are therein mentioned to have approved them, subscribed their concurrence.

"The judgment appealed against maintains the opposition of *Beaudry*" (the Respondent), "declaring him the proprietor of one-third and one twenty-first undivided part of the immoveable seized, and grants him *main-levée*, with costs.

"This judgment, according to the considerations which it contains, is founded entirely upon the nullity in law of divers titles, which the Plaintiff, the Appellant, invokes; nullity arising out of the irregularity of the sale of the lots, of which the lot seized forms part, and of the adjudication which the said Plaintiff caused

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to be made thereof to himself, proceedings which are declared to be as contrary to the deed of donation which he invokes as to the judgments also alleged by both parties.

"These considerations appear to be based on fact according to the evidence, and that being so, the legal deductions which are drawn from them appear to be correct.

"I am, then, at present inclined to think that the judgment ought to be affirmed. The Plaintiff would be in a better position if the donee had not brought an action to cause a power of sale to be given him which the donation itself gave. Having chosen to place himself in the hands of the law, he was bound to execute the instructions given him, and the sale ought to have been accompanied by all the formalities imposed by the Court. Now many of these formalities, important, if not essential, have been omitted, and that, according to the evidence, under the direction of Plaintiff, in his interest and to the prejudice of the other parties interested.

"These are the considerations which have led me to believe that the judgment is right, contrary to what I thought at first, as it then appeared to me that as the donee could of himself, without authorization, sell the immoveable of the substitution without being obliged to have recourse to the Court, the erroneous proceedings which had taken place could not prejudice the sale, since they ought to be looked upon only as surplusage which could not affect the validity of the sale; but, upon reflection, I think that since a judgment has been sought and obtained, and that at the request of the Plaintiff, the conditions which it has imposed ought to have been complied with."

Mr. Justice *Badgley* entered very fully into the facts and the law of the case. The following passages are taken from his judgment:—

"The donor died in 1843, and in the following year *François Xavier* determined to exercise his power to sell the orchard under the conditions contained in the deed of donation. Now it is conceded on all hands that he had full and sufficient authority by that deed to make a valid sale without recourse to proceedings at law, but desirous, *ex meliore cautelâ*, and to give the assurance of

law to his power by a declaratory judgment in favour of his right, he was advised to institute a suit at law for this purpose, which required a representative of the substitution to be Defendant in the suit, against whom the judgment might be rendered *contradictoirement*. It became necessary to appoint a tutor to the substitution, to act as such Defendant, and for that purpose he caused a petition to be presented to a Judge in Chambers, which, reciting his right of usufruct and power of sale under the deed of donation, and also the substitution therein established in favour of his children, and his belief that the appointment of the experts mentioned in the deed should be the joint action of himself and of a person appointed to represent that substitution, prayed that a tutor should be appointed for that special purpose; whereupon, after the necessary judicial and formal proceedings had, *Joseph Castonguay* became the tutor specially to represent that substitution.

"It may be proper at once to observe, with reference to this appointment, that the *tuteur à la substitution* was unknown to the old French law in force some time prior to the *Ordonnance des Substitutions* of 1747, and was the adoption of later French practice; the appointment, however, was special, without real authority or responsibility. Unlike the tutor to a minor, the interests of the substitution were not in his charge, and he was the merely nominal representative of the substitutes as against the *grevé*. *Thévenot d'Essaule* describes the office as follows:—'*Nos tuteurs à la substitution ne sont guère nommés que pour mettre le grevé en état de faire juger ses prétentions contre les substitués dont le droit n'est pas ouvert, c'est une personne qui a été imaginé pour donner au grevé un adversaire contre lequel il puisse diriger son action, etc. etc., quand les substitués ne peuvent ou ne veulent pas le faire eux-mêmes*' (1). This was the *qualité* and office of the tutor appointed, as stated above, who was the Defendant in the suit, the conclusions of which prayed that the right of the Plaintiff, the said *François Xavier*, to sell the orchard should be affirmed by the judgment of the Court, and that experts should be appointed to report as to the advantage to the said substitutes of effecting the sale." . . . .

"The Opposant claims the property through the three children of

(1) Traité des Substitutions [Ed. 1778], art. 1273.

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the late *Benjamin Castonguay*, who died, as stated, some years prior to the date of the deed of donation, and he avers that they were *appelés* to the substitution, that is, substitutes created by that deed, and that the substitution became open to them and in their favour, under the terms of the deed of donation, upon the death of *François Xavier* without children; and that their proprietary right rests upon the particular clause of the deed recited above, and also at length in his opposition, and which is as follows: '*Et dans le cas de mort du dit donataire sans enfans, la jouissance et usufruit des biens à lui présentement donnés seront réversibles à ses* frères et sœurs ou à aucun d'eux *pour* par eux en jouir leur vie durante, *et si au décès du dit donataire sans enfans tous ses frères et sœurs étaient décédés, la propriété des dits biens retournera et appartiendra à leurs enfans nés et à naître en légitime mariage, pour être partagés entr'eux par souches.*'

"Taking the entire clause, its plain meaning manifests the donor contemplating the brothers and sisters of the donee living at the execution of the deed, as surviving him at his death without children, and their leaving legitimate children, because she then and there directed and stipulated that, upon his death without children, the usufruct and enjoyment given to him should revert to and be enjoyed by those brothers and sisters, or the survivor of them, a disposition which could not include *Benjamin*, who had died several years prior to the making of the disposition, and, further, that if upon such occurrence all his referred-to brothers and sisters, that is, those contemplated by her as above, were dead, the absolute given property should return and belong to their children, born and to be born of them in marriage, to be divided amongst them *par souches*. The words '*leurs enfants nés et à naître en légitime mariage*' could not apply to the children of the long-before pre-deceased *Benjamin*. . . . .

"No homologation [*i.e.* of the Second Report] was either ordered or required, and, if needed, its omission was not fatal, where the law did not attach any penalty of nullity to the absence of the formality. It is also objected that the judgment of 1847 directed the observance of *requisite formalities* for the sale; a reference to the adjudging terms of the judgment itself shews no such direction, mentioning *formalités requises* as an incident of the *considérant* only; but even

if they were directed, they were not specified, and therefore, as observed above, could only be those adopted in practice, to give the best publicity to the sale, and to secure the highest price for the property; unlike the sale of minors' property, this power to sell required none of the formalities of family advice or judicial sanction, the power here existed independent of either, and there only remained the publicity to be assured which the law found in the announcements of sale by *affiches* and *enchères*. Having the power to sell, as an absolute right for his own personal beneficiary purpose, he required no Court authority for its exercise. *Furgole* says (1), that the Ordonnance of Substitutions, which in this matter is declarative of French practice, at and before its promulgation in 1747, '*n'exige pas que le grevé obtienne une ordonnance de justice pour procéder aux enchères ni à la vente, cette formalité n'est donc pas nécessaire;*' and *Grenier*, in his 'Treatise of Donations,' a modern author of repute, says, '*On doit remarquer encore que la vente doit être faite* du seul mouvement du grevé, sans qu'il soit nécessaire de l'autorité de la justice. Tel est le vœu de la loi, à laquelle on ne doit point ajouter. *Furgole en faisant aussi l'observation*' (2). Both advise that the formalities of *affiches* and *enchères* should be adopted and observed, and *Furgole* says (3), '*Je crois néanmoins que le grevé ne peut pas faire ces aliénations* à moins qu'il n'en ait reçu un pouvoir et un mandat de la part des substituants, *sans y observer les formalités prescrites par l'Art.* 8 *de ce titre, c'est-à-dire, sans affiches et enchères; car, si ces formalités sont nécessaires pour la vente des meubles qui sont ordinairement de peu d'importance, elles sont encore plus nécessaires pour l'aliénation des immeubles dont l'objet est plus considérable.*' In French practice, the rule of those formalities prevailed even for the sale-empowered *grevé*, and that rule has been strictly and more than fully carried out in this case; the object of the rule being to ensure publicity for the sale, and to prevent fraud and sacrifice in the sale of the property. It is proved of record by the documents of sale produced, that written notices of sale were made and used by the *huissier* employed; that they contained a description of the several lots as numbered in the plan, their several dimensions and boundaries; that they were

(1) Commentaire de l'Ordonnance sur les Substitutions [A.D. 1767], tit. ii. art. 8.
(2) I. No. 392, pp. 842, 843. (3) Furgole, tit. ii., art. 31.

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announced to be sold on the 1st of September following in the public court room of the Circuit Court in the Court House of this city, and to be then and there adjudged to the highest bidder upon the terms and conditions in the *cahier des charges* deposited with the selling notary *Bourbonnière;* that the notice was affixed and posted on the door of the parish church of this city on the 16th of August preceding the sale, and was there publicly read and announced in French and English at the issue of Divine service on the three consecutive Sundays previous to the sale, the 16th, 23rd, and 30th of August; that the return of the bailiff was deposited with the notary, to form part of his record of official proceedings for the sale.

"The witness, Notary *Bourbonnière,* who conducted the sale, proves that the sale had been also advertised in four or five public newspapers published in the city in French and English. Now these formalities so adopted carried out the requirements of law and practice which *Furgole,* at p. 238, explains '*il suffira qu'il fasse apposer des affiches dans les lieux où la vente doit être faite, et dans les lieux circonvoisins, si le lieu où la vente doit être faite n'est pas une ville considérable: que si c'est une ville, les affiches doivent être mises aux porte des Églises paroissiales, etc., etc., afin que le public en soit informé, cependant il suffit que le grevé rapporte des exploits de l'apposition et affiches etc., et après que les affiches auront demeuré pendant un temps suffisant pour instruire le public, la vente sera faite aux enchères dont il sera dressé un procès-verbal qui sera signé par un huissier,*' and *Grenier,* the modern French author above referred to, says '*Relativement à ces formes, il est difficile d'appliquer à cette matière celles qui sont prescrites par le code de procédure civile relatives à la vente de biens de la part d'un héritier bénéficiaire, ou d'un curateur à une succession vacante, ou à la vente des biens des mineurs. La différence des cas et des personnes écarte l'application de ces règles: mais il suffit qu'il y ait des formes indiquées par le Tribunal, le tuteur à la substitution ayant été appelé* (as he was in the suit aforesaid) *qui aient pour résultat que la vente soit faite publiquement et sans fraude, une estimation préalable ordonnée par jugement et faite par experts nommés en justice et la vente faite aux enchères et en l'étude d'un notaire* (in this case in the Court room, more public than a notary's office, and more commodious) *après des affiches apposées aux lieux accoutumées et dont l'apposi-*

tion soit établie paraissent présenter toutes les sûretés possibles.' Besides these requirements, as stated by *Grenier*, there were the public advertisements in the city newspapers. There could therefore be no irregularity in these proceedings; but it is objected, that there was no *cahier des charges* of the sale, which should have been submitted to the Court for approval, and also to the tutor. Now, the conditions and terms under which the sale was made, and which it is proved were read by the notary in French and English to the audience before the sale commenced, are filed and proved in this contention, the *cahier des charges* being, in fact, nothing but those conditions drawn up formally for the sale either by the vendor himself or by his conducting notary, as they would be in the conditions of auction sales by the selling auctioneer. '*Le cahier des charges est un acte par lequel on règle les conditions d'une adjudication publique; dans les adjudications, le vendeur ne traitant qu'avec le public il est nécessaire qu'il fasse connaître les charges et conditions de la vente dans le cahier des charges appelé aussi cahier d'enchères. Quand il s'agit d'adjudication volontaire il est facultatif de le rédiger au moment de l'adjudication ou d'avance; et, lorsque la vente est remise devant un notaire le cahier des charges peut être indifféremment rédigé par l'avoué poursuivant le notaire ou les parties, etc. Tel est l'usage à Paris, particulièrement pour les licitations, etc., etc., et même il peut être rédigé par la partie poursuivante elle-même; ainsi jugée par Arrêt de Cassation*, 1828.'

"The description of the property to be sold, with its particulars, and the conditions of sale without uncertainty or ambiguity, under the hand of the notary, constitute the *cahier des charges*, and *De Villargues*, in his Dictionary of the Code, says, '*au surplus le cahier des charges non-contestées* (that is, by a regular contestation before the sale), *avant l'adjudication fait la loi à toutes les parties*,' *Arrêt de Cassation*, 11 Aug. 1813. Both were in form under the hand of the notary, and were signed by him after submission to, and approval by, the counsel at law of the said *François Xavier*, and of the said *Leclère*.

"The Court had nothing to do with them, because the *vente à l'enchère* was the prerogative of the vendor, the *grevé*, without its interference or sanction, and the official approval of the tutor was not needed for the same reason, and moreover because he had

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already impliedly approved the sale by his general submission *à justice*" . . . .

"As to the presence of the tutor at the sale, it is only necessary to say that it was a matter indifferent, because it is laid down that '*sa présence à la vente n'est pas indispensable, il n'est donc pas nécessaire de la constater.*' The general charges of fraud and connivance alleged against *Leclère* are entirely without foundation". . . .

"Under all the circumstances of this contention, it appears that no substitution in favour of the Respondent's vendors, the three children of *Benjamin*, was established by the deed of donation or opened for them as *appelés* by the death of *François Xavier* without children; that they had no proprietary right in the substituted property, the orchard, nor consequently in the lot under seizure, and could not convey any to the Respondent; that the exercise of the power of sale of the orchard was conducted with the requisite formalities of law and practice; that the adjudication and sale were formal and regular; and that the several deeds of sale specially objected against by the Respondent, to wit, the deed of sale by *François Xavier* of the 14th of September, 1857, of the said six numbered lots for the consideration therein mentioned to the said *Leclère*, were and are good and valid in law, the said *Leclère* thereby becoming proprietor of the said six lots; that the deed of sale by the said *Leclère* to the said Defendant of one of the said six lots, to wit, No. 9, under seizure in this cause, whereby the said Defendant became proprietor thereof also, was and is good and valid in law; that the opposition *afin d'annuler* made and filed herein by the Respondent, Opposant aforesaid, against the seizure of the said lot is untenable in law and fact, and should be dismissed with costs, leaving to the said Respondent his recourse for his said one twenty-first part of the constituted rent attached upon the said lot when the same shall become open in his favour."

From the judgment of the Court of Queen's Bench the representatives of *Leclère* appealed to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Wills*, Q.C., and Mr. *Westlake*, for the Appellants:—

The donor may make what terms he pleases in his deed of gift,

and may confer what powers he thinks fit upon the institute: *Demolombe*, art. 455, p. 432 [A. D. 1865]; art. 457, p. 433. Here the donor has given a power of sale in certain events, and on observing certain conditions. That takes it out of the ordinary category. *Demolombe*, tit. xxii. art. 561, p. 532, where he says that the *grevé* may sell "*lorsque le disposant lui-même en avait ordonné la vente.*" The word *ordonné* used in the passage cited must mean that the order was given in the act of donation, because substitutions are irrevocable.

Where the donee has the power to sell as an absolute right for his own personal benefit, he requires no Court authority for its exercise: *Furgole, Commentaire de l'Ordonnance sur les Substitutions* [Ed. 1767], tit. ii., art. 31; *Thévenot d'Essaule, Traité des Substitutions* [Ed. 1778], pl. 21; *Roland de Villargues, Dict. vo.* "*Substitution,*" Nos. 253, 254, 255.

The existence of this special power to sell makes the case exceptional, and renders inapplicable the authorities which will be cited to shew that the donee can only sell with judicial formalities.

The contention of the Respondents would make out that there is no difference between the case where the tenant for life has and where he has not a power of sale.

As to the tutor to the substitution, *Bourjon, Le Droit Commun de la France, et la Coutume de Paris* [A. D. 1747], t. i. p. 46, shews that his functions were very different from those of a trustee in possession of the funds of the *cestuis que trust.* He is found mentioned only in connection with the *mobilier*, and as having but few duties: *Demolombe*, tit. xxii., p. 439; *Pothier* [A. D. 1845], tit. viii., pp. 516, 518; *Touillier*, v. p. 690; *Thévenot d'Essaule*, arts. 1266–1270, 1272, 1273, and tit. ii., art. 5. The condition here is, if it be judged advantageous for his children; *i. e.* he has a power of sale on the one condition of ascertaining this fact by experts. This dispenses with all other conditions, and with all formalities on the principle, *expressio unius, exclusio alterius.*

The *grevé* had not deprived himself of his right to sell: *Sugden* on Powers, 8th ed. p. 66. This being so, why should he necessarily be present at the sale? A sale of real property is made under quite different conditions from a sale of *mobilier.*

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In the ordinary case of sale by the institute there was every motive for him to get the best price. But grant that the donee here, having sold his life estate, was reduced to the condition of a bare trustee, and that therefore it is like the sale by a tutor, and the subrogate tutor ought to be present according to modern practice (*Civil Code of Lower Canada*, art. 299; *Code Nap.* 457); is there any trace of this necessity in the old law? The subrogate tutor is known to the old law: *Demolombe*, art. 461, p. 439.

Demolombe usually shews what descends from the old law. His commentary on Art. 459 of the *Code Napoléon*, makes no mention of the subrogate tutor's presence at the sale being required by the old law. *Pothier* (tit. ix., p. 65) refers very cursorily only to the sale of the real property of a minor, and simply cites the Code. *Toullier* (ii. 391), treats of it as it is regulated under the Code, and expresses strong disapprobation of so many formalities. There does not appear to be any authority to shew that the tutor subrogate must be present at the sale, nor that, under the old law, the tutor to the substitution must be present. *Bourjon* (tit. ii., p. 586) says a tutor must be present, but he refers to passages which do not bear him out; and this is only a tutor, not a subrogate tutor.

The formalities required by the old law in case of sale by a tutor of the real property of a minor were: (1) legitimate cause of sale, approved by the Judge and the relatives; (2) publication; (3) *affiches*. *Bourjon*, tit. i., p. 473: Judge, *affiches*, proclamations, *remise ordinaire*. He refers to *arrêts* of the 9th of April, 1630, and the 28th of February, 1722. For these see *Merlin, Recueil des Questions de Droit*, tit. "*Absent.*," tit. i., p. 6. He says that by the custom of *Paris* there were required: (1) valuation by experts; (2) publication and *affiches*; (3) *en justice*; (4) by auction. But he says, in the custom of *Berry*, only the authority of curator and the decree of the Judge were requisite; and he argues that these rules are not universal, and that their omission does not constitute the sale a nullity.

Every one of the formalities suggested by the Respondent himself has been complied with.

The counsel for the Appellant also argued that, *Benjamin* being

dead at the date of the deed of gift, his children were not included in its provisions.

Mr. *Eddis*, Q.C., and Mr. *F. W. Gibbs*, for the Respondent:—

The deed of gift of the 14th of May, 1827, made the exercise of the power of sale given therein to the donee dependent upon a report of experts that such sale was advantageous to the children, and as it did not provide for the appointment of experts, necessitated an application to the Court for that purpose. The Courts once seised of the cause, retained seisin throughout all the subsequent proceedings. Hence the effect of the judgment of the 13th of October, 1847, confirmed in 1857, declaring that the donee had the right to exercise the power with observance of the required forms, was to impose as conditions not merely a valuation by experts, but all the formalities required upon a judicial sale; and because they were not observed the sale is void as against the substitutes. The tutor to the substitution ought to have been consulted in the management of the sale, and particularly as to the conditions of sale. The second report of the experts was not homologated, and the subsequent proceedings in the conduct of the sale were taken without the further sanction of the Court. The power of sale was a trust for the benefit of the substitutes, which could not be delegated, as was attempted to be done by the deed of subrogation. *F. X. Castonguay* had no power to alienate the usufruct to persons who were *étrangers*, that is to say, not actual members of the family. The sale to *Leclère* was fraudulent and collusive, and not a *bonâ fide* execution of the power of sale. The children of *Benjamin* were within the terms of the deed of gift, as there is nothing to restrict the ordinary meaning of the terms employed.

[They cited *Renaud* v. *Tourangeau* (1); *The Bank of Montreal* v. *Simpson* (2); *Civil Code of Lower Canada*, arts. 979, 951, 299; *Nouveau Dénisart, Table Supplementaire*, vol. xiii., *sub v.* "*Famille*;" *Furgole, Commentaire de l'Ordonnance sur les Substitutions*, tit. ii., art. 31; *Code of Civil Procedure, Lower Canada*, arts. 322, 340, 345; *Bourjon*, tit. ii., p. 473, s. 21; *Ricard, Traité des Donations*

(1) Law Rep. 2 P. C. 4. (2) 14 Moo. P. C. 417.

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[A.D. 1723], vol. ii. pp. 478, 479; *Pigeau, La Procédure Civile des Tribunaux de France* (*Crivelli*), tit. ii. p. 680; tit. i. p. 367; *Roland de Villargues, Dictionnaire du Droit Civil, v.* "*Substitution,*" No. 255; *v.* "*Vente Judiciaire,*" No. 10, 10 *bis*.]

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Their Lordships' judgment, having been reserved, was now delivered by

SIR MONTAGUE E. SMITH:—

The late *M. Pierre Leclère*, the Appellant's testator, having obtained judgment against a Mr. *Short* for £50, the price of a piece of ground, part of an orchard in *Montreal*, he had sold to him, the Sheriff seized the ground in execution. The Respondent, *Beaudry*, filed an opposition to the seizure as purchaser of the interest of persons entitled to a share of the orchard under a deed of gift, and he sought to annul a previous sale made to *Pierre Leclère* himself, as well as the subsale by *Leclère* to *Short*.

The Court of Queen's Bench, by a majority of Judges, affirmed the decision of the Judge of the Superior Court, which in effect annulled the sale to *Leclère*, and, whether this sale ought to stand is the principal question in this appeal.

By the deed of gift referred to, dated the 14th of May, 1827, *Madame Castonguay*, a widow, gave to her son *François Xavier Castonguay*, to take effect as an immediate gift, the enjoyment and usufruct during his life of lands in *Montreal*, including the orchard in question, and after his death she gave the property, in substitution, to his legitimate children. She further declared that, in case the donee died without children, the enjoyment and usufruct should go ("*seront réversibles*") to his brothers and sisters, or any of them during their lives; and that if, at her son's death, all his brothers and sisters should be dead (the event which happened) the property "*retournera et appartiendra*," to their legitimate children *per stirpes* ("*par souches*").

Power was given to the donee to sell the orchard for a rent charge, if it should be judged by experts to be advantageous to the succession. This power under which the sale in question was made, is in the following terms:—"*Que le dit donataire pourra vendre à constitution de rente seulement, le tout ou partie du terrain*

complanté d'arbres fruitiers, si par experts et gens à ce connaissans c'est jugé avantageux pour ses enfans."

It is probable that the suitability of the land for building purposes was the motive for giving this power to the institute. Two conditions are annexed to its exercise:—1. That the sale shall be for a rent charge ("*à constitution de rente*"); and, 2, that it shall be declared by experts to be advantageous to the succession. It may be observed that both appear to have been complied with.

F. X. Castonguay, the institute, died childless in 1861, having survived all his brothers and sisters. Two brothers, *Jean Baptiste* and *Benjamin*, left children. His sister *Josephte* married *Leclère*, and there were seven children of this marriage. *Benjamin* died before the deed of gift of 1827, leaving three sons, and the Respondent, *Beaudry*, in 1857 purchased their expectant interest (one-third) in the substitution. He afterwards, in 1862, purchased the share (one twenty-first) of one of the sons of *Leclère* and his wife *Josephte*. By virtue of these purchases (subject to a question to be hereafter considered), *Beaudry* became entitled to question the validity of the sale to *Leclère*, made by virtue of the power in the deed of gift of 1827.

The following are the circumstances under which this sale was made, so far as they appear to be material:—

In 1844, *F. X. Castonguay*, the institute, desiring to exercise the power of sale, filed a petition in the Court of Queen's Bench, stating this desire, and that, with reference to the condition requiring experts to certify that the sale would be advantageous, he considered the experts should be nominated by him and a person representing the substitutes; he, therefore, prayed the Court to nominate a council of the family to appoint a tutor to the substitution for that purpose.

In pursuance of an order made on this petition a family council met and appointed *Joseph Castonguay* to be tutor.

The tutor having refused to name an expert, in September, 1844, *F. X. Castonguay* brought a suit against him praying for a declaration of his right to sell, if experts certified that it would be advantageous to the substitutes, and that the tutor should be ordered to nominate an expert. The Court ordered the parties to

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appoint experts who were to report to the Court, and they were appointed accordingly, and made a report to the Court that a sale would be advantageous to the succession.

The right to sell was still disputed by the tutor, but, upon the hearing of the cause the Court, on the 13th of October, 1847, after referring to the report of the experts and considering ("*considérant*") that *F. X. Castonguay* had then the right to exercise the power "*en observant les formalités requises*," adjudged and decreed that he had the right to sell, an estimate being first made of the value by experts to be named by the parties, or if not, by the Court.

The effect of this judgment is one of the principal questions for consideration. It is so far in favour of the Appellants that it declares the condition imposed by the donor, viz. the certificate of experts that the sale was advantageous, to have been complied with, and that the donee had then the right to sell. But it was insisted on the part of the Respondent that the Court imposed as conditions, not merely a new valuation by experts, but all the formalities required upon a judicial sale, without which the sale would be, it was contended, a nullity.

The tutor having appealed against this judgment it was affirmed with costs, after a long delay, in 1857.

The tutor again refusing to appoint an expert, the Court appointed one for him. These experts reported that the value of the orchard was £5000, and their report was confirmed by the Court on the 20th of June, 1857.

It was afterwards thought to be better to sell the orchard in lots, and, on the 24th of July, 1857, *F. X. Castonguay* petitioned the Court to appoint an expert for the tutor so to value it. The tutor appeared, and having submitted himself to the Court, the same experts were again appointed. They valued the orchard, as divided into twenty lots, and made the aggregate value, £5000 as before.

Their report was filed on the 30th of July, 1857, but no application was made either to confirm or reject it, and no further proceeding, prior to the sale, was taken in the suit.

Pending these proceedings, *F. X. Castonguay*, by a deed of the 22nd of April, 1857, sold his life interest in the usufruct to *Leclère*,

and one *Garceau*, whose rights *Leclère* afterwards acquired. By another deed of the 15th of May, 1857, reciting that subrogation had been omitted in the deed of sale, *Castonguay* declared that *Leclère* and *Garceau* should be subrogated in all his rights under the deed of gift, and the judgments of the 13th of October, 1847, and on the appeal, and might exercise them in his name, consenting to do all acts necessary to give them entire possession of the rights ceded to them by the deed of sale.

It was after the usufruct for the life of *F. X. Castonguay* became thus vested in *Leclère*, that the purchase by him of the corpus of parts of the orchard, which is now impeached, took place.

The orchard was sold on the 1st of September, 1857, at an auction held at the Court House. All the lots were sold, and a price realised much in excess of the valuation, viz., in all £6442.

Leclère was the highest bidder for six lots, which, after being put up separately, were offered in one lot. They were knocked down to him for £1000. These lots had been valued at £1300, and *Leclère* afterwards agreed to pay that sum for them. All the lots were sold "*à constitution de rente*," calculated at 6 per cent. on the purchase-money.

On the 14th of September, 1857, *F. X. Castonguay* conveyed by deed of sale these six lots to *Leclère*. On the 2nd of November, 1857, *Leclère* sold one lot to *Short*, as stated in the outset, for £50 in addition to the rent-charge; but this sum really represented a a profit of £30 only (£20 having been paid by *Leclère* for commuting the seignorial rights) and was not payable for five years.

The above purchase by *Leclère* of the six lots is impeached by *Beaudry* in the proceedings which give occasion to the present appeal, on the grounds, first, that the sale was fraudulent and collusive, and not a *bonâ fide* execution of the power of sale; and second, that the requisite formalities required upon a judicial sale not having been complied with, the sale is void as against the substitutes.

As to fraud, the Judge of the Superior Court, Mr. Justice *Monk*, came to the conclusion that it had not been established. He says: "As to frauds being set up by *Beaudry* as having been practised by *Leclère*, they have not been proved. There was looseness in his proceedings and irregularity in the particulars referred to, but no

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such intention as is imputed to him." The three Judges who formed the majority in the Court of Queen's Bench do not dissent from that opinion, and their Lordships are satisfied with it.

The principal objections urged at their Lordships' Bar on this part of the case were based on the deed of subrogation, by which *Leclère* was subrogated in all the rights of the donee. It was contended that the power of sale was a trust for the benefit of the substitutes which could not be delegated; but this, their Lordships think, is not its true nature. The settlor gave this power to her son, the donee, who was the principal object of her bounty, for his own benefit as well as that of his successors. She guarded the substitution by two conditions, viz. by requiring the sale to be for a rent-charge, and a previous report of experts. In so far as the power of sale affected the usufruct, *Leclère* had, after the transfer to him, a beneficial interest in the exercise of it, and to that extent the subrogation was protective of his own rights. The execution of the power, no doubt, remained with *F. X. Castonguay*, and he, in fact, did exercise it by authorizing and joining in the sale and executing the deeds of conveyance.

No authority in Canadian law was cited to shew that the alienation of the usufruct by *Castonguay*, and the subrogation of his rights in *Leclère*, rendered the execution of the power by the former invalid. Upon principle there is no reason it should be so. It might be very much to the prejudice of the substitution to hold that powers of this kind were extinguished upon a sale of the usufruct, which the *grevé* is competent to make, or that its subsequent execution should be considered necessarily to indicate fraud. In an analogous case arising in *England* it was held that the power was not extinguished, and that its subsequent exercise was not evidence of *mala fides*: see *Alexander* v. *Mills* (1).

No doubt, *Leclère* took the most active part in the management of the sale; but *F. X. Castonguay* concurred in all that was done, and had separate legal advisers, to whom the conditions of sale were submitted. Nothing unusual or objectionable has been pointed out in these conditions, and it appears the usual and full publicity was given to the sale.

Evidence was given of negotiations between *Leclère* and a Mr.

(1) Law Rep. 6 Ch. App. 124.

Simpson with a view to establish that *Simpson* was prevented from bidding by a promise from *Leclère* to sell to him after the auction, but the proof on this point is quite inconclusive; and, on the other hand, there is much evidence to shew that *Leclère* exerted himself to obtain a good sale, and to counteract the efforts of *Beaudry* himself to prejudice it. There is satisfactory evidence that the sale was well attended, and that the biddings were fairly conducted.

Although some of the circumstances in the case are undoubtedly such as to rouse suspicion, and the attention of their Lordships has been properly called to them, they do not think it necessary to comment farther upon the facts, particularly after the finding of Mr. Justice *Monk* already referred to, from which the majority of the Judges in the High Court expressed no dissent, and in which Mr. Justice *Badgley* strongly concurred. The latter learned Judge says: "The general charges of fraud and connivance alleged against *Leclère* are entirely without foundation."

Their Lordships therefore consider that the sale cannot be annulled on the ground that it was a dishonest one.

Its validity was next impeached on the ground that the formalities required by law had not been observed.

The objections on this head are, that the second report of the experts was not homologated, and that the subsequent proceedings in the conduct of the sale were taken without the farther sanction of the Court.

Their Lordships consider that these objections cannot prevail, unless it can be shewn that it was necessary for the due execution of the power that the sale should take place under the authority of the Court. But the counsel for the Respondent failed to establish to the satisfaction of their Lordships that, by the law of *Canada*, the exercise of powers of this kind requires judicial sanction; and all the Judges below were of the contrary opinion. Notwithstanding, however, this opinion, it was held by the Judge of first instance, Mr. Justice *Monk*, and by the majority of the Judges in the Court of Queen's Bench, contrary to the opinion of Mr. Justice *Badgley* and that of the Chief Justice *Duval*, who concurred with him, that the *grevé*, having once applied to the Court, was bound to act to the end under its directions. It will be seen

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that the Judges declare even this opinion with great doubt and hesitation.

Mr. Justice *Monk* says: "As to the question of the homologation of the second report, the Court finds difficulty in holding it to be necessary, '*à peine de nullité.*' It is not easy to see why an action was necessary at all by *François Xavier Castonguay.* The donation gave a right to sell a '*constitution de rente*' after the report of experts was made, and why should he bring a suit? Nevertheless he did sue, and the Court ordered the sale after certain formalities; it homologated the first report, and if the donee took legal proceedings he was bound to carry them out, and have the second report homologated also, and the new terms and conditions of sale sanctioned by the Court. This is the opinion I have arrived at."

The opinion of Mr. Justice *Caron*, in which Mr. Justice *Drummond* and Mr. Justice *Loranger* concurred, is to the same effect. That learned Judge says in substance, that being of opinion the donee could sell the property without having recourse to judicial authority, he at first thought the erroneous proceedings which had taken place could not injure the sale, since they ought to be regarded only "*comme un simple surplusage,*" but that on reflection he thought that, the donee having sought and obtained a judgment, the conditions which it imposed ought to have been followed.

Mr. Justice *Badgley* speaks without doubt. He says: "It is conceded on all hands that *François Xavier* had full and sufficient authority by the deed to make a valid sale without recourse to proceedings at law, but, desirous *ex cautelâ* to give the assurance of law to his power by a declaratory judgment in favour of his right, he was advised to institute a suit at law for this purpose, which required a representative of the substitution to be Defendant in the suit, against whom the judgment might be rendered '*contradictoirement.*'"

It appears, from the statement of the proceedings already given, that the suit arose in this way: *F. X. Castonguay*, desiring a tutor to the substitution to be appointed for the purpose of naming an expert on their part to make the declaration required by the deed of gift, applied to the Court. This was apparently done to obtain the nomination of an expert which should be beyond question.

But the tutor having, when appointed, refused to name an expert and disputed the right to sell, *Castonguay* took farther proceedings to procure a judicial declaration of his right to sell. The Court made this declaration of his right by their decree of the 13th of October, 1847, but annexed a condition, not required by the donor, that a valuation should be made by experts. It is not necessary to consider whether this condition was rightly imposed, because it was complied with, and the report of the experts homologated. Besides this condition, the "*considération*" of the judgment contains the words "*en observant les formalités requises,*" and it was argued that this clause made it necessary to observe all the forms required on judicial sales. Their Lordships consider this is not so. They think it very doubtful whether it was competent for the Court to impose new conditions upon the sale not required by the donor; and none, in fact, are specifically imposed by the decree, except that requiring a valuation. They think that the "*considération*" can at most be regarded as directory only, and not as imposing conditions which rendered the sale void if not complied with. It may be granted that, the formalities referred to not having been observed, the sale cannot have the quality of a judicial act; but if, as their Lordships think, the sale did not require judicial sanction, it cannot be annulled for the absence of it.

It is unnecessary to say whether, even in the case of a sale requiring judicial authority, the non-observance of the usual formalities, would, before the introduction of the Code, have been of itself a sufficient ground for annulling it; for their Lordships agree with the first impression of the Judges below, and in this case the authority of the Court was not required.

A further objection was, that the tutor to the substitution ought to have been consulted in the management of the sale, and particularly as to the conditions of sale.

It was not in their Lordships' view established by the argument at the Bar that the appointment of a tutor was essential to the valid exercise of the power of sale; and it appears to them that, at the most, the tutor was only necessary for the purpose of having the experts duly appointed.

Article 951 of the *Code of Lower Canada*, which was assumed to be declaratory of the former law, was relied on; but that

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Article does not relate to sales made in virtue of a power contained in the settlement. Such cases appear to fall within Art. 952, which is in these terms :—

"The grantor may indefinitely allow the alienation of the property of the substitution, which takes place in such case only when the alienation is not made."

The French law applicable to the province does not appear to require the appointment of a tutor, where the alienation is allowed by the grantor.

M. *Thévenot d'Essaule* in "*Traité des Substitutions*" (1266), speaks of the tutor to the substitution as a novel introduction. After referring (1272) to two cases which do not comprehend the present, he says (1273) :—

"*Hors ces deux cas fixés par l'ordonnance, nos tuteurs à la substitution ne sont guère nommés que pour mettre le grevé en état de faire juger ses prétentions contre les substitués dont le droit n'est pas ouvert. C'est un personnage qui a été imaginé pour donner au grevé un adversaire,*" &c.

It is evident that the appointment here spoken of being for the purpose of providing an adversary, where a judicial decision on some claim of the *grevé* in opposition to the substitutes is sought to be obtained, the rule is not applicable to the case of a sale in exercise of a power, where, as already shewn, no action and no judicial sanction were required.

It has already been pointed out that the appointment of the tutor was originally applied for in this case to name an expert on the part of the substitutes. It, no doubt, appears that when the tutor declined to nominate one, he was treated as an adversary against whom, as representing the succession, the suit was continued to obtain a declaration of the right of the *grevé* to sell. But if neither a suit nor judicial authority for the sale were necessary, their Lordships think the fact of the tutor being made an adversary in a needless suit cannot render his participation in the actual sale essential to its validity.

Their Lordships have therefore come to the conclusion that none of the objections made to the sale can be maintained. In doing so, they are glad to be spared the necessity of setting aside a sale which the family itself has not objected to at the instance of

a stranger, who purchased an interest at a low price, on the speculation that he might succeed in annulling it.

A question arose on *Beaudry's* title, viz. whether the children of *Benjamin*, one of the brothers of the donee, were, in the events which happened, entitled to a share under the deed of gift. *Benjamin* was dead at the time of the gift, but four of his brothers and sisters were then living. These all died before the donee, but two of the four left children; and the question is, whether the children of *Benjamin* are entitled to one-third, as the grandchildren of the donor, or are excluded by the terms of the donation.

The conclusion to which their Lordships have come on the principal matter in the appeal makes a decision on this question unnecessary, but since it has been fully argued, they desire to say they agree with the judgment of the majority of the Court of Queen's Bench in favour of the Respondent on this point.

They think in the events which have happened, viz. the death of *F. X. Castonguay* without children, having survived all his brothers and sisters, that all the grandchildren of the donor became entitled to share ("*par souches*"). The literal terms of the ultimate limitation would include the children of *Benjamin*, although he died before the donor; and their Lordships do not find in the context such evidence of an intention to exclude them as would justify a construction different from that which the ordinary and natural meaning of the language imports.

In the result their Lordships will humbly advise Her Majesty that both the judgments of the Courts below ought to be reversed, and that the opposition filed by the Respondent to annul the seizure ought to be dismissed, and that he ought to pay the costs occasioned by such opposition in both the Courts below.

He must also pay the costs of this appeal.

Solicitors for the Appellants: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the Respondents: Messrs. *Wilde, Wilde, Berger, & Moore.*

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Feb. 6, 7, 11, 12, 13; March 14.

ARCHIBALD F. MACKAY AND DANIEL MACKAY . . . . . } APPELLANTS;

AND

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE COMMERCIAL BANK OF NEW BRUNSWICK, ALEXANDER McLEOD SEELY, WILLIAM PARKS, SOLOMON HERSEY, AND JAMES VERNON . . . . . } RESPONDENTS.

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME COURT OF NEW BRUNSWICK.

Agent—Misrepresentation—Liability of Principal.

A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved; and there is no distinction between the case of fraud and the case of any other wrong.

Where one party has suffered, and another has profited by, the fraudulent representation of an agent of the latter made within the scope of his authority, the former is entitled to recover damages.

An action of deceit may be maintained against a company, whether incorporated or not incorporated, in respect of the fraud of its agent.

An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to *A.* which, by omitting a material fact, misled *A.*, and induced him to accept a bill in which the bank was interested; and *A.* was compelled to pay the bill:—

Held, that *A.* could recover from the bank the amount so paid.

In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated for the purposes of pleading as that of the principal.

The case of *Western Bank of Scotland* v. *Addie* (1) distinguished from *Barwick* v. *English Joint Stock Bank* (2).

Dicta of Lord *Chelmsford* and Lord *Cranworth*, in the case of *Western Bank of Scotland* v. *Addie* (1), observed upon.

The Judicial Committee are unwilling to send a case for re-trial, or to decide it, upon points which have been raised for the first time at their bar, and which possibly may have been treated as agreed upon, or too clear for argument, in the Court below.

THE following were the material facts in this case:—

The Appellants were merchants residing at *Liverpool*, and for

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep. 1 H. L., Sc. 145. (2) Law Rep. 2 Ex. 259.

several years had been in the habit of receiving shipments of deals from *Bartlett Lingley*, a timber merchant, of *St. John, New Brunswick*, to sell on commission; he drawing bills upon them in favour of an incorporated bank called the *Commercial Bank*. During the year 1867–8, *Lingley* had given the bank accommodation in the form of bills drawn on the Appellants, the payment of which the bank undertook to guarantee. On the 16th of June, 1868, *Lingley* drew upon the Appellants, and indorsed to the bank, several bills of exchange against cargoes shipped, and two bills for £1000 each on general account, which would fall due on the 2nd of September. The bank guaranteed the payment of these two at maturity; their guarantee was sent to the Appellants by *Lingley*, when he advised them of the drawing of the bills; the bills were accepted by the Appellants, and negotiated by the bank through their agents, *Glyn, Mills, & Co.*, of *London*.

By the mail, which left *St. John* for *England* on the 11th of August, 1868, *Lingley* wrote to the Appellants that he had drawn upon them in favour of the bank seven bills of exchange, purporting to be on account of cargoes of deals.

This letter reached *Liverpool* on the 24th of August; the bills had been sent by the bank by the same mail to *Glyn, Mills, & Co.*, in *London*, and would probably be presented to the Plaintiffs for acceptance within a few days. No remittance having been sent by the mail of the 11th of August to take up the bills guaranteed by the bank on the 16th of June, and falling due on the 2nd of September, the Appellants, on the 24th of August, sent the following telegram to *Lingley* in *St. John*:—"If not remitted guarantee two due second September, will refuse all advised eleventh." This telegram was received in *St. John* at 10·30 A.M. on the same day; several days before this *Lingley* had become insolvent and left the country, having assigned all his property to his brother, *Lewis Lingley*, and one *J. Travis*, in trust for the benefit of his creditors. *Lewis Lingley* received the Appellants' telegram, took it to the *Commercial Bank* and shewed it to *Sancton*, the cashier, who asked him to leave it for a short time; he left it at the bank for about an hour, when he called and got it again; about twelve o'clock the same day (the 24th of August), the messenger of the bank, whose

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business it was to deliver letters, telegrams, &c., took to the telegraph office in *St. John* a paper or telegraphic message in the following words:—

"To *Mackays, Liverpool.*—Sent last mail.—*Lingley.*"

This was forwarded to the Appellants at *Liverpool,* and was received by them on the evening of the same day. This paper, sent from the bank to the telegraph office, was in the handwriting of *Travis.* The messenger stated (when examined as a witness) that he got it either from the cashier or the president of the bank, he could not recollect which; the charge for sending it to *Liverpool* ($25) was paid at the time the paper was delivered at the telegraph office. This sum was charged against *Lingley* in the books of the bank on that day, thus:—"Telegraph to *Mackay, Liverpool,* $25."

The clerk who paid the money and made the entry stated that he would not have done so without authority, and he thought it was done by the direction of *Sancton.*

Before and at the time when this telegram was sent to the Appellants, *Lingley's* trust deed had been awaiting execution by the bank, and it was executed on the afternoon of the 24th of August, a meeting of the directors having been held on that day relative to their transactions with *Lingley,* who was largely indebted to the bank. By the trust deed the bank received certain property from *Lingley* and released him from all liability. The bills drawn on the Appellants on the 11th of August were presented to them on the 25th, the day after the receipt of the telegram from *St. John,* and accepted by them.

For two of these bills, one for £300 and the other for £1250, no cargoes were sent, and the Appellants were obliged to pay them.

The Appellants afterwards brought an action on the case, in the nature of deceit, against the bank, joining two of the directors as Defendants. The declaration concluded with the statement that the telegram addressed by the Appellants on the 24th of August, 1868, to *Lingley,* came into the possession of the Defendants (now Respondents), and that "the Defendants, well knowing that *Lingley* had left *St. John,* but intending to deceive the Plaintiffs, and to induce them by false pretences to accept the said bills of exchange so presented, and to induce the Plaintiffs to believe that the

message thereinafter mentioned was sent by *Lingley*, falsely and fraudulently forwarded by the *Atlantic* telegraph cable a certain message, purporting to be a reply to the said message sent by the Plaintiffs, which message or reply was in the following words:— '*Mackays, Liverpool;* sent last mail, *Lingley;*' and purporting to be sent by the said *B. Lingley;* whereas, in fact, *Lingley* was not then in *St. John*, nor ever received the first-mentioned message, or made any reply thereto: all which said premises were well known to the Defendants. That the Plaintiffs afterwards, on the 25th of August, in the year aforesaid, at *Liverpool*, received the said telegram so sent by the Defendants, and relying upon and confiding in the truth and genuineness thereof, and believing that it had been sent by *Lingley*, were thereby induced, and did accept the said bills of exchange so presented to them, amounting to the sum of £20,000, which, but for the receipt of the said telegram, and believing in its genuineness, they, the Plaintiffs, otherwise would not have done. That afterwards, on the 28th of November in the same year, when the said bills of exchange, so accepted, became due and payable, the Plaintiffs were unable to pay the same, and the Defendants did not provide the Plaintiffs with funds to retire the same, but wholly neglected and refused so to do; and the Plaintiffs, by means thereof, and by reason of accepting the said bills of exchange, were obliged to and did suspend payment, and compromised with their creditors, and thereby their business as merchants and their credit and standing were greatly injured and destroyed, and they otherwise sustained great damage."

The case came on for trial before Mr. Justice *Weldon*.

There was conflicting evidence as to whether the telegram was sent to the Appellants by order of the directors of the bank.

The following passages occur in the learned Judge's charge to the jury:—

"The words of the telegram are true so far as concerns remittances having gone forward by the mail preceding the 24th of August, but false as purporting to come from *Lingley*. The bank knew *Lingley* could not send such a telegram, as he had absconded from the province several days before, and the law will infer an improper motive if the telegram is false within the knowledge of the bank and sent for a purpose which, being acted upon

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by the Plaintiffs, has occasioned, or will occasion, damage to them. It may be said that everything stated in the telegram is literally true, and so it was, but the objection to it is not that it does not state the truth so far as it goes, but that it conceals most material facts with which the Plaintiffs ought to have been made acquainted, the very concealment of which gives to the truth the character of falsehood. . . .

"The ground of this action is the intention to deceive and injure the Plaintiffs, and in this, as in all other questions of *mala fides*, the jury are to judge.

"The first question that arises, is as to the bank as a corporation, whether this action is maintainable against it?

"The tendency of modern decisions has been to make corporations civilly as well as criminally liable as individuals.

"It has been held that they may be sued in trespass and trover, and for other acts which work injuries to parties, but not for acts of criminality. It would in my opinion be an absurdity to hold, that if a man draws another into a snare, that the party should have no remedy by action. An action on the case for deceit is an action well known to the law, although not of frequent occurrence; and I cannot agree with the learned Counsel for the Defendants that such an action will not lie against the bank, because it is *ultra vires* of their charter. I am of the opinion that the bank may, by their officials, make representations, and that the principle that fraud consists as well in the suppression of what is true as the suggestion of what is false applies to them; and may not the bank do this or adopt a statement made by their officers as well as individuals? I am of the opinion that they are equally liable. The next point is whether *Sancton* had authority to bind the bank corporation by sending the telegram, supposing you are satisfied from the evidence that he did send it? It is not, I believe, contended that if the president had sent it, that he would have been authorized, yet his act would have bound the company.

"As to the cashier *Sancton* sending it, I am not prepared to say that it did not belong to him to conduct the financial arrangements and correspondence of the bank, unless authorized to do so; but let us see what the president of the bank, *McLaughlin*, says

Sancton did. 'He kept the books, conducted the correspondence, and prepared the telegrams. I did not know of $25 being paid by the bank for this telegram. *Sancton* would give directions to pay for telegrams sent for the bank. The trust deed of *Lingley* was signed after *Lingley* left. The trustees told us that he had left and was hopelessly insolvent. *Sancton* was a good business man and we acted on what he said. I did understand from *Lewis Lingley* that unless funds went forward the bills of the 11th of August would not be accepted. I think I heard of it after the trust-deed was signed. I found that guarantees were given to *Mackay;* when I came in as president it was handed down to me; the object of guarantee was to obtain funds. *Sancton* was the man that arranged the financial matters of the bank; he was the "Wind-raiser." As a director I knew of this mode of raising money before I became president. It would not be for the benefit of the bank to be known. All was done through *Sancton.* I did not ordinarily give directions. All persons about the bank took their orders from *Sancton.* It was understood that such guarantees should be done; when it was done he would bring it before us. It was in the letter book. I have read the letters. They were always open; *Sancton* knew the object. I remember the 17th of June. I remember this letter of June 24th raising £7000; it was of importance to the bank. *Sancton* told me all the transactions of the bank. I cannot account for *Lingley* being charged $25 on the 24th of August. He was not here on that day. I never knew of the bank charging for a telegram which they did not send.'

"This is the evidence of the president, which shews that *Sancton* conducted all the correspondence of the bank. Whatever might be the president's duty, it was discharged by *Sancton,* and the president and directors left it with him. We find it also by the correspondence of the bank. Then we find that remittances to retire the bills of June 16th have not gone forward to retire the £2000 of bills mentioned therein, maturing on September 2nd. *Mackays* send a telegram to *Lingley* on the 24th of August, to inform him that unless £2000 due the 2nd of September were remitted for (these were the sixty-day bills mentioned in the letter) all bills advised on the 11th of August will be refused. Herefrom the course of dealings between the bank,

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Lingley, and *Mackay* is mixed up (1). Money matters, bills of exchange, in which the *Commercial Bank* had been incorporated to deal and carry on business; who was to look after these things for the bank? Were the president and directors to do so, or was it their accredited officer, the cashier, that they recognised as empowered to do this? It would seem by the correspondence that *Sancton*, the cashier, was the sole person. We see the letters addressed to the president, proposing the terms upon which *Lingley* draws bills for the accommodation of the bank on *Mackays* answered by being 'accepted' or 'approved' by *Sancton*, as cashier, alone, neither president nor directors affirming them. Can there be a reasonable doubt that this was known to the president and directors? If it was not known, it should and ought to have been known, and they had the means of knowing; and if they were ignorant of such large sums being obtained from *Lingley* for the accommodation of the bank, and which the bank had to provide funds to retire, it would be strong evidence that the president and directors had vested in *Sancton*, the cashier, the authority to transact with *Lingley* and *Mackay* the monetary business of the bank, which properly belonged to the president and directors; and therefore, upon general principles, when a general authority was given to *Sancton*, as is shewn by the letters and acts of the bank, this implies a right to do all subordinate acts incident to and necessary to carrying out the arrangements which it was incumbent upon the bank to do. This corresponds with the president's statement, which is uncontradicted. I am of the opinion that *Sancton* was their agent. I consider the bank was interested in the exchange which had gone forward, so that *Sancton* might be considered as authorized by the bank to act in the matter, and for his acts the bank would be liable. Then we find from the evidence of Mr. *Gardiner*, the confidential clerk of the Plaintiffs at *Liverpool*, on the 24th of August, 1868, that on that day the Plaintiffs received their letters from *St. John*, but no remittances to retire *Lingley's* bills guaranteed by the bank, falling due on the 2nd of September, and that bills for £3750, drawn by *Lingley* in favour of the bank, which had been sent to *Glyn, Mills, & Co.*, the bank's

(1) The Record is somewhat confused here, but the meaning seems to be as printed above.

agents, by that mail, would be presented next day. They telegraphed *Lingley*, as they had been accustomed to do, as follows :—

"'Per cable, 24th August, 1868.

"'*Mackays, Liverpool,* to *Lingley, St. John, N. B.*

"'If not remitted guarantee two due second September, will refuse all advised eleventh.

"'Reply quickly.'

"This telegram is received at *St. John* by *Lewis Lingley*, who was one of the trustees of *Bartlett Lingley*, about ten o'clock. He knowing what it meant, and the interest the bank had in the bills, after consultation with his co-trustee *Travis*, took this telegram to *Sancton*, the cashier, and delivered it to him in his room at the bank. He leaves the telegram there by the desire of *Sancton*, and before twelve o'clock calls and receives it back; in ten minutes past twelve an answer is brought to the telegraph office and handed to *Clinch*, the superintendent, who knew of the telegram and that it required an answer. This answer was delivered to him by *Harrison*, the messenger of the bank :—

"'24th August.

"'*Lingley* to *Mackay*.—Sent last mail.—*Lingley*.'

and he pays $25 for it. The messenger of the bank says he got it from the cashier or president; there is no doubt of this. The fraud which the Plaintiffs complain of is, that the bank sent an answer to the telegram forwarded to *Lingley*, leading the Plaintiffs to believe that *B. Lingley* had sent it, when in fact he was not in the country; and they say and prove that in consequence of that telegram they accepted bills drawn by *Lingley* in favour of the bank for £3750, which they would not have done if the telegram, falsely purporting to come from *Lingley*, and which they had no means of knowing was untrue, had not been sent.

"The question, therefore, which I submit for your consideration is this: Was the telegram to *Mackays*, purporting to come from *Lingley* and delivered by the messenger of the bank to the telegraph office on the 24th of August, 1868, sent by the cashier or president to *Mackays* with the intention of inducing them to accept the bills advised in the letter of August 11th, and were those bills accepted by *Mackays* in consequence of that telegram?

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If you find this in the affirmative it was a fraud in law. This is for you to find. You find the fact. The question of the intention is found by you, and I pronounce, in law, the fact so found by you to be fraud, a legal fraud, which renders the bank liable. There being no evidence to fix *Seeley* and *Vernon* personally, your verdict will be for them. As to damages, if you find for the Plaintiffs I am of the opinion that the bills for £1250 and £350 (1) which they accepted, and for which they received no payment, are the measure of damages."

The jury found a verdict for the Plaintiffs against the said bank only, for the sum of $8488.

In Hilary Term, 1871, a rule was obtained on behalf of the said bank in the said Supreme Court, pursuant to leave reserved at the trial, calling on the Plaintiffs to shew cause why the said verdict should not be set aside and a nonsuit entered, or why a new trial should not be granted; and the said rule was, in Hilary Term, 1872, made absolute for a new trial. The Appellants thereupon applied for, and obtained from the said Supreme Court, leave to appeal to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Benjamin*, Q.C., and Mr. *Anstie*, for the Appellants:—

The bank, of course, did not authorize *Sancton* to commit a fraud, but it entrusted him with the conduct of this class of business, and he conducted it unfairly, and committed the fraud in the course of his employment. The bank would not have been liable if he had committed fraud while he was not doing the business entrusted to him. It was important for the bank to get the bills accepted by the Appellants. The majority of the Judges were misled by the consideration that *Sancton* had not been authorized to do what he did; but if he was doing the principal's business at the time, the principal is responsible. They failed to distinguish between authority to commit a fraudulent act and authority to transact the business in the course of which the fraudulent act was committed.

The Appellants are entitled to retain their verdict if they have sustained damage from the fraudulent representation of an agent

(1) A mistake for £300.

of the Defendants made within the scope of his authority, even if the Defendants did not profit thereby. The Plaintiffs are entitled, even supposing the representation of *Sancton* not to have been within the scope of his authority, if the Defendants accepted the benefit of that representation with notice of the fraud: *In re Cork and Youghal Railway Company* (1). There is a concurrence of all the circumstances that make the bank responsible; the fraud was committed by their servant in the ordinary course of his employment, and they have knowingly taken the benefit of it.

The evidence shews that some of the bank officers besides *Sancton* were privy to the fraud, and after the bank knew of the fraud it exacted payment of the bills. *Lingley* was raising money for the bank by his bills, and when the telegram was sent it had released, or was intending to release him. When his composition deed was executed the bank was the only party interested in procuring the acceptance of the bills, and it paid them to *Glyn & Co.* on its own account.

Glyn & Co. thereby became holders for value without notice, whose claim on the bills the Appellants could not resist, and therefore they were obliged to come to an arrangement with *Glyn & Co.* It was not questioned in the Court below that *Glyn & Co.* were holders for value. The telegram was false in this respect,—that it conveyed to the Appellants the belief that *Lingley* was still present and carrying on his business at *New Brunswick*, when in fact he was insolvent and had absconded, and this false statement induced the Appellants to accept the bills. The case of *Barwick* v. *The English Joint Stock Bank* (2) lays down the law fully and governs this case. The act which constituted the fraud was committed by *Sancton* on behalf of the bank, and for the purpose of getting money for the bank, and the test is, shall the principal take advantage of the fraud?

In *Western Bank of Scotland* v. *Addie* (3) a new corporation had been formed with the concurrence of the Appellant, and it was held that he could not recover against the new company in respect of his claim against the old company for misrepresentation by its directors. The decision is not inconsistent with the case of *Barwick*

(1) Law Rep. 4 Ch. 748. (2) Law Rep. 2 Ex. 259.
(3) Law Rep. 1 H. L., Sc. 145.

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v. *English Joint Stock Bank* (1), though some of the dicta of Lord *Chelmsford* and Lord *Cranworth* are questionable. *Swift* v. *Winterbotham* (2) has been reversed in the Exchequer Chamber, but on grounds which do not affect the general doctrine on which it was decided. A master is liable for all misfeasance of his servant committed in the course of the business in which his master employs him, though not if the servant wilfully gets into mischief on his own account: *Limpus* v. *London General Omnibus Company* (3). In *Ranger* v. *Great Western Railway Company* (4) it was laid down by Lord *Cranworth* that a corporation is liable if its agent commits a fraud, as an individual would be in the like case. The Judge put to the jury every controverted question, not questions which were not contested before him. Our pleadings in the Court below may be inartificial, but the substance is that we have been damnified, and the bank has had the benefit of it. The benefit cannot be retained and the liability disclaimed.

It may be that a person cannot ratify an act which was not professedly done on his behalf, but if he takes the benefit of such act he is estopped from repudiating the authority. We cannot recover consequential damages, for the party sued had no *mens rea*, but we claim the amount which the principal has received through the fraud of his agent. The declaration is correct, but claims too much. The Respondents did not deny that we had paid, but we claimed special damage which we cannot recover. The summing-up took exactly that view of the law.

[The Appellant's counsel also referred to *Udell* v. *Atherton* (5); and *Reese River Silver Mining Company* v. *Smith* (6).]

Mr. *Butt*, Q.C., and Mr. *Cohen*, Q.C., for the Respondents:—

The communication of the Appellants was not addressed to the bank, and it was not in the usual or necessary course of the bank's business to answer such communications. In *Poulton* v. *South-Western Railway Company* (7) the station master did an act which he had no authority to do, and it was held that his principal

(1) Law Rep. 2 Ex. 259.
(2) Law Rep. 8 Q. B. 244.
(3) 32 L. J. (Ex.) 34.
(4) ~~Law Rep.~~ 5 H. L. 86.
(5) 7 H. & N. 172; 30 L. J. (Ex.) 317.
(6) Law Rep. 4 H. L. 64.
(7) Law Rep. 2 Q. B. 534.

was not liable, as he had only given authority to do things right and proper. It is otherwise where the act, though wrongly done, is within the scope of the authority given to the agent: *Goff* v. *Great Northern Railway Company* (1); *Seymour* v. *Greenwood* (2); *Limpus* v. *General Omnibus Company* (3); *In re Cork and Youghall Railway Company* (4).

The message purported to come from *Lingley*, so the Appellants cannot say they were misled by giving credit to the bank.

Ratification can only be when one person has professed to act for another. Here *Sancton* did not profess to act for the bank: *Wilson* v. *Tumman* (5); *Eastern Counties Railway* v. *Brown* (6).

There can be no action for deceit where there has not been falsehood. Moral fraud is essential: *Burley* v. *Walford* (7); *Wilde* v. *Gibson* (8). The cases are collected in a note to 2 *Smith's* Leading Cases [6th Ed.], p. 92.

There is no rule that the principal having received benefit must return it.

If a ship master at an English port, where the shipowner resides, orders supplies for the ship on bottomry bond, and consumes them accordingly, the owner is not held liable; and so where money is borrowed to pay towage, but without authority: *Arthur* v. *Barton* (9); *Beldon* v. *Campbell* (10). If a stranger had done what *Sancton* did, and the same events had followed, the bank would not have been liable on an action of deceit or any other proceeding.

There can be no action against a corporation for fraud and deceit. A corporation is created for certain purposes only. A private partnership may extend its business, but a corporation is limited to its professed objects.

We rely on *Addie* v. *Western Bank of Scotland* (11). The doctrines laid down by the Judges in that case were necessary for the decision of the case, and if they do not agree with the case of

(1) 30 L. J. (Q.B.) 148; 3 E. & E. 672.
(2) 30 L. J. (Ex.) p. 327; 7 H. & N. 358.
(3) 32 L. J. (Ex.) 34; 1 H. & C. 528.
(4) Law Rep. 4 Ch. 748.
(5) 6 M. & G. 236.
(6) 6 Ex. 326.
(7) 9 Q. B. 197.
(8) 1 H. L. C. 605.
(9) 6 M. & W. 138.
(10) 6 Ex. 886.
(11) Law Rep. 1 H. L., Sc. 145.

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Barwick v. *English Joint Stock Bank* (1), which was decided about the same time, the doctrine of *Addie* v. *Western Bank of Scotland* ought to prevail. That doctrine is stated in *Benjamin's* Treatise on the Contract of Sale [2nd Ed.], p. 371. The case of *Swift* v. *Winterbotham* (2) has been overruled in the Exchequer Chamber.

This action is brought in tort because the Plaintiff knew he could not recover in contract. There can be no rescission here, and consequently no recouping. The bank did not know of any fraud at the time when the Appellants were induced to accept the bills. There is no evidence of general damage.

The Appellants cannot be allowed now to amend the pleadings so as to make a new case. We have got an order for a new trial, and there is no cross appeal. The proper questions were not left to the jury.

Sancton was not authorized by the directors to send the telegram. The Appellants have not proved that they paid the bills. If they did pay them, they paid them voluntarily, and with knowledge of the fraud, in which case they cannot recover.

1874 *March* 14.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The most material facts in this case may be thus stated:—

Mr. *Lingley*, a timber merchant, of *St. John's*, *New Brunswick*, had for some years before June, 1868, been in the habit of consigning cargoes of deals to the Messrs. *Mackay* (the Plaintiffs), who are timber brokers in *Liverpool*, and of drawing bills upon them, which he indorsed to the Defendants, who are an incorporated bank, carrying on business at *St. John's*; he also from time to time drew upon the Plaintiffs bills for the accommodation of the bank, for the payment of which the bank sometimes gave guarantees to the Plaintiffs.

On the 16th of June, 1868, *Lingley* advised the Plaintiffs of several bills which he had drawn upon them, of which two of £1000 each, falling due on the 2nd of September, 1868, were guaranteed by the bank, who were to transmit funds to meet them before their maturity. In this state of circumstances *Lingley*

(1) Law Rep. 2 Ex. 259. (2) Law Rep. 8 Q. B. 244.

wrote to the Plaintiffs on the 11th of August, 1868, advising them of several fresh bills, due on the 26th of November, which he had drawn upon them and indorsed to the bank to the amount of £7750, all of them, as he stated, against cargoes, but of which two, of £1250 and £300 respectively, were not in fact drawn against cargoes. This letter of *Lingley's* was received by the Plaintiffs on the 24th of August, 1868, whereupon they sent to *Lingley* the following telegram :—

"*Mackays, Liverpool*, to *Lingley, St. John's, New Brunswick.*—If not remitted guarantee two due 2nd September will refuse all advised eleventh. Reply quickly."

The message arrived at *St. John's* on the same day. *Lingley* had then absconded, having, on the 18th of August executed a deed conveying all his property to trustees, to which deed, releasing *Lingley* from all liabilities to the bank, the president and cashier of the bank were parties. The telegram was taken to the bank by *Lingley's* brother, whereupon *Sancton*, the cashier, answered it in these terms :—

"To *Mackays, Liverpool.*—Sent last mail.—*Lingley.*"

It must be assumed that neither the president of the bank nor its directors instructed *Sancton* to send this telegram, or knew of its having been sent till long afterwards. The Plaintiffs' case was that, although the statement "sent last mail" (which must be taken to mean that remittances had been sent to meet the guaranteed bills falling due on the 2nd of September) was true, yet that the telegram was fraudulently sent in the name of *Lingley*, and conveyed, and was intended to convey, to them a false representation that *Lingley* was still in *St. John's*, and carrying on his business, whereas he had become insolvent and had absconded; that, acting on the faith of this representation, they accepted the bills, which they would not have done had they known the truth; that they had to pay the bills, of which payment the bank, who indorsed and remitted them to Messrs. *Glyn* on their own account, obtained the benefit. The action was what is commonly called an action of deceit, in which the Plaintiffs stated the false representation as that of the bank; and there was an allegation of special

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damage in the shape of injury to their credit, coupled, however, with an allegation of general damage, under which it would be open for them to claim as damage payment of the bills. Two of the directors of the bank, *Seeley* and *Vernon*, were joined as Defendants, but, as they obtained a verdict, no question as to them arises. The Defendants pleaded not guilty.

The case was tried before Mr. Justice *Weldon* and a jury. It appeared by the evidence of the president of the bank, the Defendants' witness (referred to in his summing-up by Mr. Justice *Weldon*), that *Sancton* had a far wider authority than a cashier would be presumed to have in this country. The president says: "He kept the books, conducted the correspondence, and prepared the telegrams. . . . . *Sancton* would give directions to pay for telegrams sent for the bank. . . . . *Sancton* was the man who arranged the financial matters of the bank; he was the 'Wind-raiser.' As a director, I knew of this mode of raising money before I became president. It would not be for the benefit of the bank to be known. All was done through *Sancton*. I did not ordinarily give directions. All persons throughout the bank took their orders from *Sancton*."

Mr. Justice *Weldon* must be taken to have directed the jury that the sending of the telegram was within the scope of the authority of *Sancton:* by his note it appears that he directed them further to this effect: "The question which I submit for your consideration is this, was the telegram from *Mackays*, purporting to come from *Lingley*, and delivered by the messenger of the bank to the telegraph office on the 24th of August, 1868, sent by the cashier or president to *Mackays* with the intention of inducing them to accept the bills advised in the letter of the 11th of August, and were these bills accepted by *Mackays* in consequence of that telegram? If you find this in the affirmative it was a fraud in law, that is for you to find—you find the fact. The question of the intention is found by you, and I pronounce in law the fact so found by you to be a fraud, a legal fraud which renders the bank liable. As to damages, if you find for the Plaintiffs, I am of opinion that the bills for the £1250 and £350 (a mistake for £300), which they accepted, and for which they received no payment, are the measure of damages."

The jury found a verdict for the Plaintiffs for the full amount of the bills.

A motion was made for a nonsuit, in pursuance of leave reserved, or for a new trial. A rule for the latter was granted and made absolute by the Supreme Court, consisting of Mr. Justice *Allen*, Mr. Justice *Fisher*, and Mr. Justice *Weldon;* Mr. Justice *Weldon*, however, adhering to the view which he had expressed at the trial. Mr. Justice *Allen*, who gave judgment on behalf of Mr. Justice *Fisher* and himself, thus states the grounds on which the rule was made absolute—"on the ground of misdirection as to the matter being within the scope of the cashier's duties, and in not leaving to the jury whether *Sancton* was authorized by the directors to send the telegram."

It has been contended at their Lordships' bar, that there are other grounds on which a new trial should have been directed, or judgment given for the Defendants, viz., (1) that the Plaintiffs have not proved that they paid the bills, and (2) that if they did pay them they paid them voluntarily with knowledge of the fraud, in which case they cannot recover.

Their Lordships have carefully examined the somewhat full note taken by Mr. Justice *Weldon* of the points raised at the trial, and can find no trace of any such points; nor do the numerous "reasons" which have been prepared in the colony on behalf of Respondents contain any reference to the second point, or indeed to the first, beyond a general complaint of the Judge's ruling on the question of damages. Mr. Justice *Allen*, in giving the judgment of the High Court, thus expresses himself: "For two of the bills, one for £300 and the other for £1250, no cargoes were sent, and the Plaintiffs *were obliged to pay them;*" thus treating the payment of them by the Plaintiffs under compulsion as an unquestioned fact, instead of sending it to be re-tried, as he presumably would have done, if there had been a misdirection or an unsatisfactory finding upon it. Their Lordships are always extremely loth to send a case for re-trial, much more to decide it upon points which appear to have been raised for the first time at their Bar, and which possibly may have been treated as agreed upon or too clear for argument by the Court below. It is enough to say that the Supreme Court having assumed (without apparently a controversy

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on the subject) that the Plaintiffs were compelled to pay the bills, their Lordships are not satisfied that this assumption was unwarrantable. Their Lordships further assume, as appears to have been assumed in the Court below, that the Defendants obtained the benefit of these payments in their account with the Messrs. *Glyn*.

This being so, the points for consideration are confined to those stated by the judgment of the Supreme Court as the grounds on which the new trial was directed.

The Court appear to treat the question whether or not *Sancton* was acting within the scope of his authority (there being no conflicting evidence as to the general nature of his authority) as a question of law, and hold that Mr. Justice *Weldon*, instead of directing the jury that the sending of the telegram was within the scope of *Sancton's* authority, ought to have directed them that it was not. The only question of fact which they direct to be submitted to the jury is, whether or not the sending it was sanctioned by the directors.

Their Lordships regard it as settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority. This doctrine has been laid down by Lord *Holt* in *Hern* v. *Nicholls* (1), by Lord *Ellenborough* in *Alexander* v. *Gibson* (2), by *Parke*, B., in *Cornfoot* v. *Fowke* (3), although, under the peculiar circumstances of that case, he held the Defendant not liable; also by *Parke*, B., in *Moens* v. *Heyworth* (4); by *Tindal*, C. J., delivering the judgment of the Exchequer Chamber in *Wilson* v. *Fuller* (5); and again by the Court of Exchequer in *Udell* v. *Atherton* (6), where, it is true, the Court was divided in its judgment, but where Baron *Martin*, who held that the Plaintiff had not proved his case, stated the question to be, "Was the agent's situation such as to bring the representation he made within the scope of his authority?"

There are, however, some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine. It is seldom possible to prove that the fraudulent act

(1) 1 Salk. 289.
(2) 2 Camp. 555.
(3) 6 M. & W. 373.
(4) 10 M. & W. 157.
(5) 3 Q. B. 77.
(6) 7 H. & N. 172; 30 L. J. (Ex.) 317.

complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond "the scope of the agent's authority" in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds: at the same time, it is not easy to define with precision the extent to which this liability has been carried. The best definition of it, in their Lordships' judgment, is to be found in the case of *Barwick* v. *English Joint Stock Bank* (1), when the judgment of the Exchequer Chamber was delivered by one of the most learned Judges who ever sat in *Westminster Hall.* In that case the Plaintiff was induced to continue to supply oats to a customer of the bank, a contractor with the Government, on a guarantee from its manager to the effect that the customer's cheque in the Plaintiff's favour, in payment for the oats supplied, should be paid on receipt of the Government money, in priority to any other payment "except to this bank." The manager fraudulently concealed from the Plaintiff that the customer was indebted to the bank in £12,000: the result was that the Plaintiff was induced to advance money to the customer on a guarantee which turned out to be worthless, and which the manager must have known to have been worthless when he gave it. The declaration contained, among other counts, one for deceit, in which the fraud of the manager was laid as the fraud of the bank, on which count alone the judgment is based. Baron *Martin* having directed a nonsuit, a *venire de novo* was ordered by the Exchequer Chamber, whose judgment was delivered by Mr. Justice *Willes.* He expressed himself as follows:—"With respect to the question whether a principal is answerable for the act of his agent in the

(1) Law Rep. 2 Ex. 259.

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course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. The principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods." After enumerating other instances of its application, he proceeds:—"In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

He further lays down, "If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the fraud of the person who is sought to be made answerable in the action."

This doctrine was acted upon lately by the Court of Queen's Bench, in *Swift* v. *Winterbotham* (1), where they held a banking company liable in respect of a fraudulent guarantee by their manager of the solvency of a person, although the bank derived no benefit from this representation. This judgment was, indeed, reversed in the Exchequer Chamber, on the ground that the signature of the manager was not the signature of the company within the words of the 9 Geo. 4, c. 14, s. 6, and that the representation was made by the manager only in his individual capacity; but Lord *Coleridge* in delivering the judgment observes: "This does not at all conflict with the case of *Barwick* v. *English Joint Stock Bank* (2), and cases of that description, because there can be no doubt that where an agent of a corporation, or a joint stock company, in conducting its business does something of which the joint stock company take advantage and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act, justice points out, and authority supports justice in maintaining, that they cannot afterwards repu-

(1) Law Rep. 8 Q. B. p. 244. (2) Law Rep. 2 Ex. 259.

diate the agency, and say that the act which has been done by the agent is not an act for which they are liable."

It has been contended, however, that *Western Bank of Scotland* v. *Addie*, decided in the House of Lords about the same time (1), is at variance with *Barwick* v. *English Joint Stock Bank* (2). Their Lordships, however, do not so regard it.

Mr. *Addie* alleged that he had been induced to take shares in the *Western Bank of Scotland* by fraudulent representations of its directors, and claimed to recover the value of his shares, or to be reimbursed the damages which he had sustained. After his purchase of the shares and before he instituted his suit, the bank, which had been an unincorporated company under 7 Geo. 4, c. 67, was with his concurrence incorporated and registered under the *Joint Stock Companies Act*, 1856, for the purpose of being wound up. Upon these facts it was decided that Mr. *Addie* had no remedy against the new corporation which had been formed. Lord *Cranworth* observes: "He was a party to a proceeding whereby the company from which the purchase was made was put an end to—it ceased to be an unincorporated, and became an incorporated company, with many statutable incidents connected with it, which did not exist before the incorporation. The new company is now in the course of being wound up. . . . . He comes too late; the Appellants are not the persons who were guilty of the fraud, and although the incorporated company is by the express provisions under which it was incorporated made liable for the debts and liabilities incurred before the incorporation, I cannot read the statute as transferring to the incorporated company a liability to be sued for frauds or other wrongful acts committed by the directors before incorporation."

The case was therefore decided upon a point which did not arise in the case of *Barwick* v. *English Joint Stock Bank*.

But some expressions used by Lord *Chelmsford* and Lord *Cranworth* to the effect that an action of deceit is not maintainable against a corporation in respect of frauds of its agents, have been strongly relied upon on behalf of the Respondents. With all respect for everything falling from authority so high, their Lordships cannot regard these *dicta*, relating as they do to English

(1) Law Rep. 1 H. L., Sc. 145. (2) Law Rep. 2 Ex. 259.

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forms of action, as necessary to the decision of *Addie* v. *Western Bank of Scotland*. Lord *Cranworth*, indeed, admits that, "if by the fraud of its (*i.e.*, an incorporated company's) agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by these frauds."

Upon this it may be observed that, if the fraud by which the corporation benefited consisted of a misrepresentation not forming part of or leading to a contract with it, it is difficult to see how, in many cases, they could be made responsible, except in an action for deceit. If it be suggested that an action for money had and received might lie, it may be answered that even if that were so, the question to be tried would be in substance the same, and the evidence the same, and that the time has passed when much importance was attached to mere forms of action. If the benefit received by the corporation happened to be in the shape of a specific chattel instead of money, it is difficult to see what better title they would have to retain it, but in that case the action for money had and received would not lie, and some form of action of tort would have to be resorted to. Lord *Cranworth* further observes, in explanation of some observations which fell from him in *Ranger* v. *Great Western Railway Company* (1), "the allegation of *Ranger* was that by the fraud of Mr. *Brunel*, the company's engineer, he had been induced to contract to do and had done works for them at a price grossly below their real cost, say for £20,000 instead of £40,000. The company got the full benefit of what he had so done, and in what I said I merely wished to guard against its being supposed that I assented to the argument that there would be no means of reaching the company, if the fact of the fraud had been established. By what particular proceedings relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed, any opinion." Unless the remedy against a company in respect of the fraud of its agent is to be confined to cases where the fraud is part of a contract, and the contract can be rescinded so as to place the parties in *statu quo*—a doctrine much narrower than that laid down by Lord *Cranworth*—it appears to their Lordships to follow that an action of deceit is maintainable, wherein, as laid down by the

(1) 5 H. L. C. 86.

Exchequer Chamber, the fraud of the agent may be treated for purposes of pleading as the fraud of the principal. Nor do they see any valid reason for exempting incorporated more than unincorporated companies from this action. In their opinion, Lord *Cranworth* stated the law on this subject correctly in *Ranger* v. *Great Western Railway* (1), when he observed "strictly speaking, a corporation cannot of itself be guilty of a fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation."

It remains to apply the principles of law which have been stated to the facts of this case.

If there had been any serious conflict of evidence as to the duties and authority of *Sancton*, it would have been proper to direct this question to be retried. But their Lordships are satisfied to take, as Mr. Justice *Weldon* did, the statement of the Defendant's witness, the president of the bank, on this subject. Had the message been sent to the bank it can scarcely be questioned that it would have been the duty of *Sancton* to answer it with a view to obtaining the acceptance of the Plaintiffs to the effect that funds had been provided for the previous bills, and if, with the same object, he had added to this a statement that *Lingley* was carrying on his business at *St. John's*, although, of course, it would not have been his duty to state a falsehood, still the sending of the telegram with the false statement would have been "within the scope of his authority," as that expression has been explained. But, it has been urged, the telegram was sent, not to the bank, but to *Lingley*, and was answered on behalf of *Lingley*, not of the bank. The position, however, of *Lingley* and of the bank must be borne in mind. *Lingley* had been released from all his obligations, and was no longer interested in the acceptance of the bills: the bank was deeply and solely interested in their acceptance. Under these

(1) 5 H. L. C. 86. 18 Jur. 798

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circumstances, on the telegram being brought to the bank, their Lordships think that it was still in the usual course of the business intrusted to *Sancton* to answer it, and that when he did answer it in the bank's interest in such a manner as to convey what was false together with what was true, he was still acting "within the scope of his authority."

For these reasons their Lordships are of opinion that Mr. Justice *Weldon* was right in directing the jury that the sending of the telegram was within the scope of *Sancton's* authority. This being so, the question whether or not *Sancton* was authorized to send it by the directors becomes immaterial.

It is not necessary to determine whether or not the Plaintiffs could have maintained their verdict if they had proved only they had sustained damage from the fraudulent representation of an agent of the Defendants made within the scope of his authority, without proof of the Defendants having profited thereby: nor whether they could have maintained it, if they had not proved the representation of *Sancton* to be within the scope of his authority, but had proved that the Defendants accepted the benefit of it, with notice of the fraud,—propositions which have been contended for at their Lordships' Bar. It is enough in this case to decide that the Plaintiffs, having established that they have suffered damage and that the Defendants commensurately profited by the fraudulent representation of *Sancton* made within the scope of his authority, are entitled to maintain their verdict.

For these reasons their Lordships will humbly recommend Her Majesty that the judgment of the Supreme Court be reversed, and the order directing a new trial be discharged.

The Appellants will have their costs in the Courts below and of this appeal.

Solicitors for the Appellant: Messrs. *Vizard, Crowder, & Co.*

Solicitors for the Respondent: Messrs. *Field, Roscoe, Field, Francis, & Osbaldeston.*

THE COLONIAL BANK OF AUSTRALASIA AND JOHN TURNER, THE OFFICIAL AGENT OF THE GOLDEN GATE GOLD MINING COMPANY, REGISTERED . . . . . } APPELLANTS;

AND

ROBERT WILLAN, A SHAREHOLDER IN THE SAID MINING COMPANY . . . . . } RESPONDENT.

J. C.*
1874
Feb. 28;
Mar. 3, 4, 23.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Mining Courts of the Colony of Victoria—Appeal—Inferior Court—Certiorari.

Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitution of such companies, and for regulating their proceedings, it will be assumed, in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with.

The Supreme Court of the Colony of *Victoria* has a general power to issue a writ of certiorari to any inferior Court in the Colony to bring up the proceedings of such Court, co-extensive with the like power of the Court of Queen's Bench in *England*.

The Courts of Mines, which have been created by Acts of the local Legislature of the Colony of *Victoria*, and with a jurisdiction limited both as to the persons and the matters within the Colony over which it is to be exercised, stand, in relation to the Supreme Court, on the footing of inferior Courts.

The power of the Supreme Court to issue a certiorari to the Courts of Mines in respect of any proceedings under the Mining Statute, 1865, has been taken away by statute.

An appeal may be brought by the shareholders of a mining company to the Chief Judge of the Court of Mines against an order made by a Judge of a Court of Mines for winding up a company upon such a proceeding as that prescribed by the 28th and following sections of the *Mining Companies Limited Liability Act*, 1864.

Where certiorari is said to be taken away by statute, the Superior Court is not absolutely deprived of the power to issue the writ; but its action as to the writ is controlled and limited, and it cannot quash the order removed by certiorari except upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order, or of manifest fraud in the party procuring it.

Matters on which the defect of jurisdiction depends may be apparent on

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR LAWRENCE PEEL.

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the face of the proceedings, or may be brought before the Superior Court by affidavit, but they must be extrinsic to the adjudication impeached.

Objections on the ground of defect of jurisdiction may be founded on the character and constitution of the inferior Court, the nature of the subject matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior Court.

The objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the Judge has erroneously found a fact which was essential to the validity of his order, but which he was competent to try.

The principle acted on in *Rex* v. *Bolton* (1), that an adjudication by a Judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, recognised and followed.

The rule in *Bunbury* v. *Fuller* (2) approved.

It is not incumbent on a person lending money to a joint stock company to ascertain that all the proceedings of the company and its shareholders, *inter se*, have been strictly regular.

Where a question was raised whether a fraudulent use had been made of the machinery for winding up registered companies, such question being a complicated one, dependent on a variety of circumstances capable of explanation, and requiring nice consideration :—

Held (reversing the decision of the Supreme Court of the colony of *Victoria*), that the order complained of ought not to have been quashed on certiorari.

Semble, the Court of Mines of the colony of *Victoria* has power to review an order of its own for winding up a registered company whether made *ex parte* or not, on the suggestion that the order was fraudulently obtained.

If a party makes a fraudulent use of the process of a Mining Court, and no remedy is to be had in that Court, the parties aggrieved may obtain relief by regular suit in the Supreme or other competent Court.

THIS appeal was brought from a judgment of the Supreme Court of *Victoria*, making absolute a rule nisi to quash an order made by the Court of Mines of the district of *Beechworth*, for winding up the *Golden Gate Gold Mining Company, Registered.*

The company had been registered at *Woods Point*, in the said district, under the 9th section of the Colonial Act, 27 Vict. No. 228, the *Mining Companies Limited Liability Act*, 1864, and had thereby become incorporated by virtue of the 12th section of that Act.

The company originally kept its banking account with the *Union Bank*, and the account was overdrawn. On the 7th of March, 1866, one *Philip Weis* was requested by certain persons, who acted as directors of the company, to act as temporary

(1) 1 Q. B. 66. (2) 9 Exch. 111.

manager. He, as such temporary manager, caused an advertisement to be inserted in the *Argus* newspaper, published at *Melbourne*, calling an extraordinary meeting of the shareholders. The terms of the advertisement were as follows:—

"*Golden Gate Gold Mining Company, Registered.*

"An extraordinary meeting of the shareholders of the above company will be held at the office of the company, *Raspberry Creek*, on Monday, the 7th of May, 1866, at 3 o'clock, P.M.

"Business—

"1. To appoint a manager.

"2. To audit accounts and transact such general business as may be brought forward.

"3. To cancel existing scrip and issue new scrip.

"March 12th, 1866. "*Philip Weis*, Manager, *pro tem.*"

A meeting was held accordingly on the 7th of May, 1866. At this meeting the following resolutions were carried, namely: "That Mr. *P. Weis* be appointed manager of the company." "That the banking account be moved from the *Union Bank* to the *Colonial Bank of Australasia*, and request Mr. *Hogarth* to wait on the manager of the *Colonial Bank* and make arrangements with him regarding the overdraft to the *Union Bank*." Shortly after the date of this meeting the company's banking account was transferred from the *Union Bank* to the *Colonial Bank of Australasia*, and the latter bank satisfied the overdraft.

It may be convenient to indicate here the provisions of local legislation which bear most closely upon the proceedings out of which the appeal arose.

By the *Gold Fields Act* of the colony of *Victoria*, 1857, 21 Vict. No. 32,

The Governor in Council is empowered (sect. 13) to erect any portion of the colony into a mining district; and it is provided (sect. 14) that in every such district there shall be a Court to be called the Court of Mines. The Judge of the Court of Mines may (sect. 70) grant a rehearing, and may state a case for the opinion of the Supreme Court. (Sect. 71.) An appeal lies from the Court of Mines to the Supreme Court; and it is provided (sect. 127) that no proceedings under the Act shall be removed or removable into the Supreme Court save as thereinbefore provided; and by sect. 71, "If any party to any suit in any Court holden under this Act, or to any proceeding before the Judge of any such Court, shall be dissatisfied with the

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determination or decision of the said Court, or with any order of a Judge thereof, not being an order of commitment, such party may appeal from the same to the Supreme Court.

The 27 Vict. No. 228, the *Mining Companies Limited Liabilities Act*, 1864, provides,

Sect. 6. "That every such company shall appoint a manager, and no action or suit at law or in equity shall be brought against any member of such company for the recovery of any debts contracted for or by the company."

By sect. 7, "Every contract made by the manager for the time being for the purchase of goods or the performance of work, and the supply of the materials for the same, to an amount respectively not exceeding £50, for the purposes of the said company, shall be binding upon the company and upon the assets thereof, as herein provided; and such assets may be seized and sold in execution in any action against such company upon any such contract."

Sect. 9 provides for the registration of the company in the Court of Mines nearest to the place of operations.

Sect. 12 enacts that on the registration of a company under the Act it shall become a corporation.

Sect. 15 prescribes, under a penalty, that every such company shall have a registered office, to which all communications and notices may be addressed; and service of any notice or legal process at such office shall be deemed to be service upon the company.

By sect. 21, "Any company registered under this Act, with the sanction of a majority in number and value of the shareholders in such company given at an extraordinary meeting, may from time to time increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as such majority directs, and also from time to time may borrow money not exceeding such sum as such majority directs."

Sect. 23. "Fourteen days' notice of any extraordinary meeting to be called under this Act shall be given to each shareholder by inserting the same in six consecutive numbers of some newspaper published in *Melbourne*, and in six consecutive numbers of some newspaper published in the neighbourhood of the place of operations of the company; and such notice shall be signed by the manager, and shall specify the place, the day, and the hour of meeting, and the nature of the business, otherwise such meeting shall not have power to transact any business, and every such notice so given shall be sufficient without any other notice whatsoever, any rule of law or of the company to the contrary notwithstanding."

Sect. 26. "After the incorporation of any company, the manager shall (unless it is otherwise provided by any rules of the company) convene an extraordinary meeting of the shareholders, for the purpose of deciding the number of directors, and for electing the same; and the majority in number and value of the shareholders present at such meeting shall decide and elect accordingly; and such directors shall have the custody and use of the common seal, and shall carry on and transact the business and affairs of the company."

Sect. 27 empowers the Governor to appoint an official agent for each mining

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district, and provides that when the Court of Mines shall have made any order or decree for winding up a company, the official agent for the district shall have power to collect all debts and to sell or dispose of all the assets of the company, and to enforce payment by the shareholders of the amounts (if any) unpaid upon the shares held by them or any of them.

The 28th section provides as follows:—"Whenever any creditor to whom such company" (that is, any company registered under the Act) "is indebted in a sum exceeding £50 then due, has served on the company a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor, such company shall be deemed to be unable to pay its debts, and any such creditor as aforesaid may make application for winding up the company to the Judge of the Court of Mines of the district wherein such company is registered."

Sect. 29. "Any application for the winding-up of a company registered under this Act shall be by petition, and there shall be filed or lodged at the time when such petition is presented an affidavit verifying the same."

Sect. 30. "Upon the hearing of any petition as aforesaid the said Judge of the Court of Mines may dismiss such petition with or without costs, to be paid by the petitioner; or he may make an order directing the company, by a day to be named in such order, to pay or secure payment to the petitioning creditor of all moneys that may be proved to be due to him, together with such costs as such Judge may direct; or the said Judge may (if he so thinks fit) on the hearing of such petition make an order or decree for winding up the company forthwith, or such other order as to such Judge shall appear to be just."

Sect. 31. "If at the expiration of the time named in such order as aforesaid such payment is not made or security given, the said Judge of the Court of Mines may thereupon make an order or decree for winding up the company."

Sect. 39. "The majority in number and value of the shareholders in any company may from time to time, both before and after incorporation, make and alter rules for prescribing the number and qualification of directors and fixing a quorum thereof; for holding and convening general and special, but not extraordinary, meetings of the shareholders and directors respectively; for the election, removal, and annual retirement of all or some of the directors; for determining the mode of filling occasional vacancies in that body; for settling the number of votes which shareholders may give in respect of any specified number of shares, and whether such votes may or may not be given by proxy; for the deposit and custody of proxies (if allowed and used); for removing and appointing the manager, bankers, and solicitors of the company; for declaring dividends and making calls; for the transfer and relinquishment of shares, and the conditions on which the same respectively may be effected; for keeping minutes of all general, special, and extraordinary meetings of the directors and shareholders respectively; for preparing half-yearly balance sheets of the accounts of the company, and auditing and examining the same; for making and producing the reports of the business and affairs thereof; for the custody and use of the common seal, and for any other objects not inconsistent with this Act. But if any such rule shall be made or altered after incorporation, it shall be made or altered only at an extraordinary meeting of the shareholders."

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The 3rd section of the Act 31 Vict. No. 324 (A.D. 1867), "An Act to Amend the *Mining Companies Limited Liability Act*, 1864," is as follows:—

"It is declared and enacted that the words, 'upon the hearing of any petition,' wherever the same are used in the said Act, shall be construed, deemed, and taken to mean and include an application to a Judge of the Court of Mines, whether sitting in Court or not, or to the Court of Mines, and whether made to the said Court or to the said Judge upon an *ex parte* application, or after service of notice of such application at the office of the company, or upon summons so served returnable before the Judge or before the Court; and no order heretofore or hereafter to be made shall be deemed to be invalid or impeachable upon the ground that the same was made by the Judge or by the Court upon an *ex parte* application: Provided that the said Judge or Court of Mines shall have power from time to time, if it should be deemed advisable, upon the application of any party claiming to be interested in or affected by such order, to set aside or vary any such order."

The Courts of Mines were first created in 1857 by the local statute above cited, No. 32 of the 21 Vict., since repealed by the *Mining Statute*, 1865. At the time of the proceedings out of which the appeal arose the latter Act defined the powers and functions of the Courts of Mines, and regulated their procedure.

The jurisdiction given to these Courts to wind up registered companies was conferred upon them by the *Mining Companies Limited Liability Act*, 1864 (1), which was passed after the former, but before the latter, of the two last-mentioned statutes.

By the *Mining Statute*, 1865, it was enacted that within and for every mining district there should be a Court to be called the Court of Mines; that such Court should be a Court of record; that the Court of Mines which at the time of the commencement of the Act should be in existence in any mining district existing at that time should be and be deemed a Court of Mines constituted under that Act.

To these Courts this statute gave, in very general terms, jurisdiction to hear and determine all suits which might arise concerning miners' rights in Crown lands, or concerning or out of any partnership for or in relation to mining in any Crown land, or for or in relation to the searching for the metals and minerals mentioned in the Act, or generally concerning all questions and disputes cognizable by a Court of Law or by a Court of Equity which

(1) Sect. 28, *supra*, p. 421.

might arise between miners in relation to mining on Crown lands. But it did not expressly refer to the peculiar jurisdiction to wind up registered companies which had been given to the Judges of Courts of Mines by the Act of 1864.

Again, a material difference between the *Mining Statute*, 1865, and the repealed Act of 1857 consisted in this. The latter had, by its 71st section (1), given an appeal from the Courts of Mines to the Supreme Court, and by its 127th section had provided that no proceedings under that Act should be removable to the Supreme Court except as therein provided. The *Mining Statute*, 1865, created a Chief Judge of the Court of Mines, who was to be one of the Judges of the Supreme Court; and, by its 172nd section (2), gave an appeal to him in lieu of the appeal given by the repealed statute to the Supreme Court; providing, by its 244th section, that "no proceedings under that Act should be removed or removable into the Supreme Court, save and except as thereinbefore provided (3)."

In the month of September 1866, the *Colonial Bank of Australasia* commenced an action against the company to recover the sum of £2163 3*s.* 4*d.*, as due to the bank by the company on the overdrawn account. A defence was entered on behalf of the company to the action, and issue was joined therein and notice of trial given, but the bank obtained orders to postpone the trial for three successive sittings, and it did not proceed further in the action, but abandoned it; nor did it take any further or other proceedings in respect of the claim against the company until the year 1871.

On the 11th of August, 1871, the Appellants served on the company a demand in writing requiring the company to pay the sum of £3223 11*s.* 8*d.* (being the amount advanced by the bank to satisfy the overdraft above referred to, with interest); and on the

(1) *Supra*, p. 419.

(2) "Any party to any suit in any Court of Mines, or to any proceedings before the Judge of any such Court (except where the contrary is herein provided), who shall be dissatisfied with any decree or order of the said Court, or with the order of a Judge thereof, not being an order of commitment made by such Judge, may appeal from the same to the Chief Judge."

(3) This was a mistake, as the Act contains no provision on the subject.

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16th of November, 1871, the bank served on the company, at its registered office in *Melbourne*, a notice requiring the company to appear at the Court House at *Wood's Point* on the 18th of the same month, to answer a petition therein stated to have been already presented (but which in fact had not been presented), and to shew cause why a winding-up order should not be made by the Judge of the Court of Mines of the district.

On the 18th of November the bank presented a petition (verified by affidavit) to the Judge of the Court of Mines, setting forth that the mining company was indebted to the bank in the sum of £3223 11*s.* 8*d.* for moneys lent by the bank to the company; that the bank had served on the company a written demand requiring the company immediately to pay the said sum; that the company had, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same; and that the whole of such sum was still due and owing by the company to the bank; and praying that the company might be wound up under the provisions of the *Mining Companies Limited Liability Act*, 1864.

Post 425 — On the same day the Judge of the Court of Mines made an order that the company should be wound up forthwith. The order was in the following terms:—"Whereas on the 11th of August, 1871, the *Colonial Bank of Australasia*, a creditor of the said company, served on the said company a demand, under their seal, requiring the said company to pay the sum of £3223 11*s.* 8*d.*, then due to the said bank, and the said company has, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the said bank: And whereas, on the 18th day of November instant, the said *Colonial Bank of Australasia* did present to me, the undersigned Judge of the Court of Mines of the district in which the said company was registered, to wit, in the district of *Beechworth* aforesaid, their petition setting forth the facts hereinbefore recited, and praying that the said company might be wound up; and at the time of presenting the said petition, an affidavit of *William Greenlaw*, the acting general manager of the said bank, verifying the same, was filed in the last-mentioned Court: And whereas the said company has been

duly served with a notice in this behalf, which required them to appear here before me this day to answer the said petition, and to shew cause why I should not make an order directing the said company, by a day to be named in such order, to pay or secure payment to the said *Colonial Bank of Australasia* of the said sum, together with such costs as I might direct, or why I should not make an order for winding up the said company forthwith, or such other order as to me should appear to be just: And whereas the said company has not appeared before me this day, or shewn any sufficient cause as required by the said notice: Now, therefore, upon the hearing of the said petition, and upon reading the said affidavit, and upon proof as well as of the facts and matters aforesaid, as that the said sum is now due from the said company to the said *Colonial Bank of Australasia*, and upon hearing Mr. *Finlayson*, of Counsel for the said *Colonial Bank of Australasia*, I do order that the said company shall be wound up forthwith."

On the 16th of February, 1872, the agent in *Melbourne* for the Appellant, *John Turner* (who was the official agent for the district, under the 27th section of the *Mining Companies Limited Liabilities Act*, 1864 (1), and as such was charged with the conduct of the winding-up) shewed to *William Scott*, the manager of the mining company, at the company's office, the original winding-up order. Subsequently the Appellant, *John Turner*, as such official agent, called, by advertisement, a meeting in the estate of the company for the proof of debts, to be held at the Court of Mines, *Beechworth*, on the 6th of May, 1872. At this meeting the bank proved a debt against the company to the amount of £3223 11*s.* 8*d.*, to the satisfaction of Mr. *Hackett*, the Judge of the said Court of Mines, in pursuance of the provisions of the 33rd section of the *Mining Companies Limited Liability Act*. This proof was not opposed.

On the 26th of August, 1872, the Respondent made an application to the same Court to set aside the order obtained on the 18th of November, 1871.

Mr. *Bowman*, the deputy Judge of the Court of Mines, who heard the application, stated in his judgment that it had been admitted by Counsel on both sides that the main point left for him to decide was whether the winding-up order of the 18th of

(1) *Supra*, p. 420.

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November, 1871, was or was not made upon an *ex parte* application; that presuming, as he thought fair, that the notice was given early in the morning of the 16th of November, the company had two days during which they might have acted; that there was telegraphic communication between *Melbourne* and *Wood's Point*, and that, so far from the affidavit of the manager of the company setting out that he used due diligence and made reasonable efforts to comply with the notice served, it distinctly set forth that he did nothing. The Deputy Judge therefore, held that he was bound to assume that the Judge who made the winding-up order exercised a wise discretion and due caution in satisfying his mind that notice of the application had been duly served, and he decided that the order was not made upon an *ex parte* application, and that it ought not to be set aside.

On the 10th of September, 1872, the Supreme Court, upon the application of the Respondent, ordered that a writ of certiorari should issue directed to the said Deputy-Judge, commanding him to send under his seal the record of the order of the 18th day of November, 1871, which was done accordingly.

On the 22nd day of November, 1872, a rule nisi was obtained by the Respondent, calling upon the Deputy Judge and the Appellants to shew cause why the order of the 18th of November, 1871, should not be quashed, on the grounds, first, that there was no jurisdiction to make the said order, as at the time it was made the company was not indebted to the bank in any sum; and, secondly, that it was obtained by a fraud on the Judge.

The affidavits on which the writ was issued were made by the Respondent, by *Philip Weis*, and by certain shareholders in the company.

The case made by the Respondents was to the following effect:—

No rules of the company were made before the incorporation thereof, or until April, 1867, and no directors were elected or appointed at any meeting of shareholders duly convened until the 26th of April, 1867, when, at an extraordinary meeting of the shareholders duly convened, directors were for the first time duly elected and appointed, and at the same meeting rules were for the first time made.

That *Frederick B. Ludlow* was the first manager of the said company, that *Philip Weis* was the second manager: that on or about the 7th of March, 1866, *Weis*, before he claimed to have been appointed manager, and before *Ludlow* had formally resigned or been removed, was requested by one *William Hogarth*, a shareholder in the company, and the alleged chairman of a meeting of persons (who called themselves directors, but had never been in fact elected or appointed) to act as temporary manager; and *Weis* at the request of the said *William Hogarth* and another, caused to be inserted in the *Argus* newspaper, published in *Melbourne*, the above advertisement, dated the 12th of March, 1866, but it did not appear that it had been published as required by the Act, and, in fact, the notice was not duly or regularly given in accordance with the provisions of the Act.

That a search had been made in the minute book of the company, from the date of its incorporation up to the month of September, 1866, and the minute book during the said period did not contain any resolution of any extraordinary or other meeting of the shareholders of the company authorizing any borrowing of money, or any resolution referring to the bank, except the second resolution of the 7th of May, 1866; that at no meeting called in accordance with the provisions of the Act was any authority or sanction given by the shareholders of the company to borrow any money from the bank or at all; and that it did not appear from the evidence that any advertisement or notice ever appeared in any newspaper whatsoever giving notice of any extraordinary or any other meeting of the shareholders of the company which specified in such advertisement or notice that the nature of the business for which the meeting was called was to authorize or sanction the borrowing of money either from the bank, or elsewhere, or at all, as required by the Act (1).

That in June, 1868, the mine and business of the *Golden Gate Gold Mining Company* were sold to another company, called the *A 1 Gold Mining Company, Registered*, in consideration of certain shares allotted by the *A 1 Mining Company* to the shareholders of the *Golden Gate Gold Mining Company*, and since the latter part of the said year 1868 there had been no business for the latter

(1) *Mining Companies Limited Liabilities Act*, 1864, s. 15.

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company to transact, and it had not, in fact, carried on any business; and, as from the month of October, 1868, the then manager of the latter company ceased to draw any salary from, or to be in any manner employed by, the company, and the company's operations having ceased, no other manager had, since the said date, been employed by the company: and that the name of the company then or soon after was taken down from No. 37, *Market Street*, which had been the office of the company.

That it was not the fact, as recited or stated in the notice served on the 16th of November, 1871, that at the date of the said notice the petition therein mentioned had been presented by the bank; and that the petition was not presented until the 18th of November, 1871, being the day when the winding-up order was made.

That the Court House at *Wood's Point*, in the mining district of *Beechworth*, at which, as stated in the said notice, the said company was required to appear on the 18th of November, the notice having been served on the 16th of November, was distant from *Melbourne* 120 miles or thereabouts, and in the month of November, 1871, the time occupied in travelling from *Melbourne* to *Wood's Point* aforesaid by coach, the ordinary and quickest mode of conveyance, was twenty-four hours.

That the shareholders had received no notice of the winding-up order and the proceedings under it until July, 1872; and that if they had received notice earlier, they would have endeavoured to cause appearance to be made and a defence to be undertaken on behalf of the company.

The Respondent, on the 22nd of November, 1872, on behalf of himself and the said majority of the said solvent shareholders, caused a rule nisi to quash the said winding-up order to be moved for before the said Supreme Court; and on the said 22nd of November, 1872, it was ordered by the said Supreme Court that the Deputy Judge, the bank, and the Appellant, *John Turner*, the official agent, should shew cause why the order made by *C. P. Hackett*, Esq. (then Judge of the said Court of Mines of the mining district of *Beechworth*), on the 18th of November, 1871, wherein it was ordered that the said company should be wound up, should not be quashed on the following grounds:—

1. That there was no jurisdiction to make the said order of the 18th of November, 1871, as at the time of serving the notice of demand and of making the said order the said *Golden Gate Gold Mining Company, Registered*, was not indebted to the said *Colonial Bank of Australasia* in any sum.

2. That the sum of £3223 11*s.* 8*d.*, mentioned in the said order, was not, nor was any part thereof, at the time of the making thereof, due to the *Colonial Bank of Australasia* by the said *Golden Gate Gold Mining Company, Registered*, and that the said order was obtained by undue and improper means, calculated to deceive the said Judge of the said Court of Mines who made the same, and to prevent the said company shewing reasons to the said Judge for refusing to make the said order, and that so the said order was obtained by a fraud on the said Judge; and on the further grounds disclosed in the above affidavits.

The affidavits used by the Appellants in shewing cause against the rule nisi stated that many of the shareholders of the company had offered to pay their proportion of the debt if the bank would give them a release; that *William Scott*, the manager of the company, had often promised to try to get the debt settled. That the Respondent signed as chairman a minute of a meeting of the board of management of the company, dated the 21st of June, 1867, at which it was resolved, in answer to a letter from the bank demanding payment of the debt, "that no steps be taken to arrange matters with the *Colonial Bank* until the amalgamation is finally completed." That on the 1st of August, 1871, the manager was informed that the bank intended to wind up the company unless the debt was paid, and the attorney who acted for the bank in the matter of winding-up used no undue or improper means in obtaining it.

The Supreme Court, on the 10th of December, 1872, gave judgment, making the rule absolute, and ordering the Appellants to pay to the Respondent the costs of and occasioned by the writ of certiorari and of the rule nisi. In the statement of the reasons given for the judgment the following passage occurs:—

"The real ground on which this application is opposed is that it is not competent for the applicants to go behind the winding-up order. It is said they are bound by the order. In one sense that

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is no doubt true: the facts which the Judge has found must be taken as true, but to maintain that it is not competent for a person to impugn the order by shewing that the Judge had no jurisdiction is a proposition that cannot be sustained. This Court has held directly the contrary, and its decision has not been questioned. We have held that it is competent to go behind a conviction, or order, or adjudication, or whatever it may be, and to shew by affidavit that the proceedings are irregular, and that the Judge has no jurisdiction. Indeed, this objection was not very strongly pressed, although it constitutes the sole objection to the application. One reason given to quash the order is the short notice given. The company was served in *Melbourne* on Thursday with notice to appear on Saturday at *Wood's Point*, a place 120 miles distant, and which requires twenty-four hours to reach by coach. According to the affidavits, it was within the bounds of possibility that a person might have reached *Wood's Point* on the Saturday, and we, therefore, think that we are not at liberty to review the consideration which the Judge must be supposed to have bestowed on this part of the case. It certainly is singular, if he considered the case at all, that he should have allowed such extremely short notice to be given in such a matter. However, we cannot discuss here the propriety of his conduct. The shortness of the notice, however, cannot be overlooked when we consider the other ground of the application, namely, that the Judge was imposed upon by the petitioning creditors. Those creditors had facts in their possession which they were bound to disclose to the Judge, but which they did not; they concealed facts from the Judge, which, if he had known, might have induced him not to make the order. These facts are, that there was really no debt due, the directors had no power to incur the overdraft, there were in fact no directors. An extraordinary meeting of shareholders would have had power to incur the debt. But the meeting was not called to sanction the debt, nor is there anything to shew it was attended by the majority in number and value of the shareholders. The bank commenced an action against the company for the sum claimed, but that action was postponed from time to time, and no satisfactory explanation has been given of the postponement. One affidavit states that the action was postponed in hopes of having the matter arranged.

That might have been a very good reason for postponement, but it seems a singular reason for stopping the action and taking proceedings to wind up the company at such short notice. We think that there is no petitioning creditor's debt proved, and that there is therefore no foundation for the winding-up order.

"For these reasons we are of opinion that the rule nisi to quash the winding-up order should be made absolute."

From this judgment the appeal was brought to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *De Gex*, Q.C. (with him Mr. *J. Dennistoun Wood*), for the Appellants:—

The Supreme Court had no right to interfere by way of certiorari. The colonial statutes give an appeal from the lower Mining Courts to the Chief Judge, and from him to Her Majesty in Council, and the Respondents ought to have appealed if they were dissatisfied. The Appellate jurisdiction of the Supreme Court in mining cases was transferred to the Chief Judge. The Supreme Court has a general power to issue a writ of certiorari to bring up the proceedings of any inferior Court in the colony; but not those of the Courts of Mines. The Courts of Mines are not inferior Courts, and, independently of this, the power to issue a certiorari to them has been taken away by statute (1).

The analogy of the old practice in bankruptcy, by which an adjudication could be set aside, does not apply, because the commission was issued behind the back of the bankrupt, and of course it was necessary that he should have some opportunity of disputing its validity. Successive enactments have provided that he shall have notice, and the adjudication may now be said to be almost conclusive. But the bankruptcy law was never applied to winding-up orders. When under the Act of 1856, power was given to various tribunals to make winding-up orders, there was much litigation as to what was the proper Court, but no one went to the Court of Queen's Bench to quash a winding-up order.

The Supreme Court has no power to deal with a company not

(1) The *Mining Statute*, 1865, *supra*, p. 423.

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registered under the *General Registration Act* of 1864. Mining companies are not so registered. They are registered in a Court of Mining, and the registration itself incorporates them (1).

The grounds assigned for quashing the winding-up order are want of jurisdiction; and fraudulent, or, at least, improper concealment of material facts from the Court which passed the order. It is said that there was no jurisdiction to make the order, because there was in reality no petitioning creditor's debt, as the meeting at which it was resolved to transfer the bank account was not duly convened for the purpose of borrowing; and it is further said that if there was no jurisdiction in the Court of Mines an appeal would not lie, and the remedy was by way of certiorari. But the Appellants were not bound to inquire whether the meeting was legally convened or not, and there are cases to shew that drawing cheques for the current expenses of the bank is not borrowing so as to require the special authority prescribed by the Act. The Judge had authority to try the fact of debt or no debt, and his finding gave jurisdiction to the Court, even if it was an erroneous finding.

The question is, whether the Lower Court had power to enter upon the inquiry, not whether it arrived at a correct conclusion. The Supreme Court was not to judge of the sufficiency of the evidence in favour of the petitioning creditor's debt: *Brittain* v. *Kinnaird* (2); *Reg.* v. *Bolton* (3) (where the cases are collected); *Ex parte Hopwood* (4). Though still requiring full proof at a later stage, the debt is conclusively proved for the purpose of finding the order by the judgment of the Court. The statute enables the Court to make a winding-up order, and the Court has done so, and has, therefore, acted within its jurisdiction.

The sufficiency of notice was declared by the Supreme Court to be a matter within the competency of the Judge of the Mining Court. The facts alleged in the petition for winding-up are perfectly true.

[Mr. *De Gex* was here stopped by their Lordships, who called upon the Counsel for the Respondents to support the order of the Supreme Court.]

(1) *Mining Companies Limited Liabilities Act*, 1864, s. 12.

(2) 1 B. & B. 432.

(3) 1 Q. B. 66.

(4) 15 Q. B. 121.

Mr. *Benjamin*, Q.C., and Mr. *Everitt*, for the Respondents:—

Unless there was in point of fact a debt, the winding-up order was made without jurisdiction. The statute lays down distinctly what authority must be given for contracting debt, and its provisions were recently acted on in this Court in the case of *Cherry* v. *Colonial Bank of Australasia* (1). The Court of Chancery does not allow a winding-up order where there is a disputed debt: *Lindley* on Partnership [3rd Ed.], p. 1280. Here the debt had not been duly sanctioned by a meeting of shareholders, so far as we have been able to ascertain, indeed, there is some evidence that no such sanction was given. The Supreme Court finds that there was no debt.

No Court of inferior jurisdiction can establish its jurisdiction by proceeding on an assumed fact which is not a fact: *Bunbury* v. *Fuller* (2); *Reg.* v. *Gillyard* (3). The fullest Chancery jurisdiction is vested in the Supreme Court. Certiorari is never taken away except by express words: *Scott* v. *Bye* (4). There are many cases of certiorari issuing out of Chancery (5).

A right of appeal can only be given by express words. Taking the different enactments together, there was no appeal open to the Respondents, and therefore, it was a case to be set right by the Supreme Court on certiorari, for when the Legislature creates a Court without appeal, it is presumed that certiorari lies to restrain excess of jurisdiction.

The Supreme Court is a Court having, both at Law and in Equity, full inherent jurisdiction (unless taken away by the Legislature) to grant a certiorari to review the proceedings of the inferior Courts, whether of Law or Equity, to prevent the assumption of jurisdiction which they are not entitled to exercise, and to control them in its exercise in certain cases. The notice to appear called on the Respondents to answer a petition therein stated to have been filed on the 16th of August, but the petition on which the order was made was not filed until the 18th. The proceedings must therefore be taken to have been without notice. The bank contrived that it should be really a proceeding *ex parte*, but should

(1) Law Rep. 3 P. C. 24.
(2) 9 Ex. 111.
(3) 12 Q. B. 527; 2 Sm. L. C. 698, 6th Ed.
(4) 2 Bing. 344, referring to judgment of Holt, C.J.; 1 Salk. 263.
(5) *Edwards* v. *Bowen*, 2 S. & S. 514.

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not appear to be so, and thus the Judge be prevented from reviewing it. If the company had appeared before the Court of Mines and disputed the debt—the Court of Mines then, for the purpose of ascertaining its right to wind up, assuming jurisdiction to determine, and actually determining, that there was a debt and then ordering a winding-up—we admit that in that case there would have been jurisdiction to wind up. But where the Judge assumes that the debt is due without argument from the other side, whether the proceeding be by default after notice, or *ex parte* without notice, the Judge has not decided the preliminary question. He has taken jurisdiction assuming the preliminary question to be conceded in consequence of the absence of controversy; and therefore certiorari lies.

This was not like a case in the County Court; there the decision is whether there is a debt. Here the decision was on the question whether there was to be a winding-up order. *Reg.* v. *Bolton* (1) was a criminal case, and of course not *ex parte:* and it does not apply to civil cases, which may be *ex parte.* The doctrine there laid down is qualified by that of *Thomson* v. *Ingham* (2), a civil case: *Reg.* v. *Paving Commissioners of Cheltenham* (3); *Reg.* v. *St. Olave* (4); *Reg.* v. *Arkwright* (5). There was no jurisdiction to wind up unless a creditor was before the Court, and the question whether there was a creditor there was never argued. The Court above could say, not that the Court below had no jurisdiction to enter into the inquiry, but that no inquiry having been entered into, and it being now ascertained that there was no creditor, the Court really was without jurisdiction. *Philipson* v. *Earl of Egremont* (6) shews that the Superior Court has power to do what the inferior might do. Excess of jurisdiction may be shewn to the Court above upon affidavit. We are not precluded from shewing this, because on the face of it, the order purports to be within the jurisdiction: *Crepps* v. *Durden,* in *Smith's* Leading Cases, where the cases are collected in the note (7); *Re Penny and South Eastern Railway Company* (8).

(1) 1 Q. B. 66.
(2) 14 Q. B. 710.
(3) 1 Q. B. 467.
(4) 8 E. & B. 529.
(5) 12 Q. B. 960.
(6) 6 Q. B. 587.
(7) 1 Sm. L. C. 666 (6th Ed.)
(8) 7 E. & B 660.

There were many circumstances which the Appellants ought to have disclosed to the Mining Court, but which they kept out of view.

The debt was not really due by the company or by the shareholders, but by those who incurred it without authority: *Cherry* v. *Colonial Bank of Australasia* (1). In the present case, the bank, after having substantially abandoned its legal proceedings from the consciousness that it was impossible for it to get a judgment, surprised the Court into making an order. The manager had for three years ceased to be such; the company had become amalgamated with another, and had notoriously given up its original business: *Smith* v. *Bank of Victoria* (2). The action, being defended, was not pressed, because the Plaintiffs knew that the debt had not been legally contracted, and they therefore hoped to get contributions *pro ratâ* from individual shareholders, many of whom were probably directors, and liable under *Cherry's Case.*

The service of the notice was not properly made at the place where the company had ceased to carry on business: *In re Manchester Assurance Association* (3).

As soon as the shareholders heard of the proceedings they applied to the Judge of the Mining Court, but he refused to act because the order was not made *ex parte.* The resolution of the 10th of June, 1867, not to arrange this debt until after the contemplated amalgamation, was the resolution of the directors, not of the shareholders. The bank ought to have disclosed that the debt was not duly contracted; and the circumstances amounting to fraud, the Supreme Court was entitled to vacate the order. If individual shareholders had been sued, they might in each action have pleaded that the judgment had been obtained by fraud upon the Court, and by the collusion of the manager, who, by not giving notice to the shareholders, suffered the judgment to be obtained: and if they might plead this separately, why should not the Court be applied to by motion to dispose of the whole subject at once? *Philipson* v. *Earl of Egremont* (4); *Bosanquet* v. *Graham* (5).

(1) Law Rep. 3 P. C. 24.
(2) 41 L. J. (P.C.) 34.
(3) Law Rep. 9 Eq. 643.
(4) 6 Q. B. 587.
(5) 6 Q. B. 601, n.

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Even if that argument bears rather upon the powers of the Court of Mines on appeal, or on review, to vacate its own order improperly obtained, either by stating falsehood or suppressing the truth, still the Superior Court has power to do whatever the inferior Court would do, if the inferior Court has been imposed upon: *Earl of Bandon* v. *Becher* (1); *Tommey's Case* (2); *Sheddon* v. *Patrick* (3).

Mr. *De Gex*, Q.C., in reply:—

This was not an appropriate mode of questioning such a transaction for fraud. The decision of Mr. *Bowman*, refusing the review, might have been appealed from to the Chief Judge of the Mining Court, and from him to the Privy Council. It is clear upon the enactments that an appeal lies, even if the terms are not perfectly express. In this country there was no appeal from the decisions of the Insolvent Debtors Court up to 1861, when the jurisdiction of that Court was transferred to the Court of Bankruptcy. An appeal had lain in bankrupt cases from the Court of Bankruptcy to the Court of Chancery; and a question arose whether after the transfer such an appeal lay in insolvent cases, there being no express provision to that effect in the Act of transfer. Lord *Cranworth* decided in the affirmative in *Ex parte Perkins* (4), because the jurisdiction to wind up was given to a Court from which, in its own practice, an appeal lay: in the matter of the *Cardiff and Caerphilly Iron Company, Gledhill's Case* (5); *West Ham Distillery Company, Whittet's Case* (6). In this country the local Courts of bankruptcy had authority to make winding-up orders, but the Court of Queen's Bench never interfered to question their orders upon certiorari. Another objection to the order of the Supreme Court is that others besides the bank and the company were interested in the winding-up order, but were not before the Supreme Court: *Underwood's Case* (7); *Upfill's Case* (8); *Bright* v. *Hutton* (9).

(1) 3 Cl. & F. 479.
(2) 4 H. L. C. 313.
(3) Law Rep. 1 H. L., Sc. 535.
(4) 34 L. J. (Bkcy.) 37.
(5) 3 De G. F. & J. 713.
(6) 2 De G. & J. 577.
(7) 5 De G. M. & G. 677.
(8) 2 H. L. C. 674.
(9) 3 H. L. C. 341.

Formerly the manner in which jurisdiction has been exercised might be questioned upon certiorari, though the jurisdiction itself was undoubted; but now where certiorari has been taken away, as it has been in many cases by statute, and as it has been here, the High Court can, on certiorari, only question the decision of the Lower Court on the ground of fraud or want of jurisdiction appearing on the face of the record: *Reg.* v. *Bolton* (1); *Brittain* v. *Kinnaird* (2); *Mould* v. *Williams* (3). The doctrine of *Reg.* v. *Bolton* has not been at all shaken by *Thomson* v. *Ingham* (4), or *Reg.* v. *St. Olave* (5). It has happened the higher Court has found that the lower Court was without jurisdiction, for various reasons; in *Reg.* v. *Cheltenham Paving Commissioners* (6), and *Reg.* v. *Recorder of Cambridge* (7), because some of the magistrates were personally interested; in *Reg.* v. *Arkwright* (8), because notice had not been given; in *Re Penny and South Eastern Railway Company* (9), because the subject matter was not within their jurisdiction. In the case of *Crepps* v. *Durden* (10) the defect of jurisdiction appeared on the face of the conviction itself. The case of *Philipson* v. *Earl of Egremont* (11) is one where there was a plea of fraud and collusion within the Court itself in obtaining a judgment; not in another Court; and here no plea of fraud or collusion is put upon the record; nor does the Respondent in his affidavit charge collusion of his own knowledge.

A decision obtained by fraud may be treated as invalid in various ways: it may be set aside on re-hearing or appeal by the Court which pronounced it, or the Court to which appeal lies, or it may be neglected or disregarded by another Court as a mere nullity, and that other Court may refuse to give effect to it: *Earl of Bandon* v. *Becher* (12); not make an order to quash it. The case of *Sheddon* v. *Patrick* (13) is rather in our favour, for the prior judgment was held to be binding though there had been some reserve on the part of those who obtained it.

(1) 1 Q. B. 66.
(2) 1 B. & B. 432.
(3) 5 Q. B. 469.
(4) 14 Q. B. 710.
(5) 8 E. & B. 529.
(6) 1 Q. B. 464.
(7) 8 E. & B. 637.
(8) 12 Q. B. 960.
(9) 7 E. & B. 660.
(10) 1 Smith's L. C. 666, see the note.
(11) 6 Q. B. 587.
(12) 3 Cl. & F. 479.
(13) Law Rep. 1 H. L., Sc. 535.

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[SIR ROBERT P. COLLIER referred to the case of *Welch* v. *Nash* (1).]

That is not a case of certiorari. It was only that the legality of the order of the justices might be questioned in an action of trespass. It is explained by the case of *Reg.* v. *Grant* (2). The winding-up order is not illegal under the Colonial statutes, because made *ex parte;* the proposition that the finding of a matter of fact which is within the jurisdiction of the justices would not be conclusive if the party did not appear, is contrary to *Ex parte Hopwood* (3) and *Ex parte Williams* (4).

As for the alleged concealment, there is nothing to shew that the Appellants knew anything about the informality of the resolution, nor was it necessary for them to inquire: *Turquand* v. *Royal British Bank* (5); *Fountaine* v. *Carmarthen Railway Company* (6); *Agar* v. *Athenæum Life Assurance Society* (7); *Prince of Wales Assurance Society* (8); *County Life Assurance Company's Case* (9). It was merely taking over an old debt, and there is nothing to shew that the original debt was not formally contracted: *Omnia rite acta præsumuntur.* Drawing cheques for the current expenses of the bank is not such borrowing as requires to be formally authorized by the shareholders: *Waterlow* v. *Sharp* (10).

[SIR MONTAGUE E. SMITH:—That is a strong case.]

It has never been shewn that the company had a good defence to the action brought by the bank; the minute of the 21st of June, 1867, is practically an admission of the debt. There could be no fault in the Appellant's not suing for it; the Respondent *Willan* himself there treats it as something to be settled afterwards; and it is set out as a debt in the books of the company. The case of the *Cefn Cilcen Mining Company* (11) is in point; likewise *In re Magdalena Steam Navigation Company* (12).

(1) 8 East, 394.
(2) 14 Q. B. 62.
(3) 15 Q. B. 521.
(4) 2 L. M. & P. 580.
(5) 5 E. & B. 248; Ex. Ch. 6 E. & B. 327.
(6) Law Rep. 5 Eq. 316.
(7) 3 C. B. 725.
(8) E. B. & E. 222.
(9) Law Rep. 5 Ch. App. 288.
(10) Law Rep. 8 Eq. 501.
(11) Law Rep. 7 Eq. 88.
(12) Joh. 690.

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The notice was certainly short, but there had been a formal demand in August, three months before. The Act does not require the petition to be filed before the summons issues. There is no wrong recital in the order to wind up, though there was a wrong recital in the notice. If the company had required time to answer they could no doubt have got it.

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Their Lordships reserved their judgment, which was now pronounced by

SIR JAMES W. COLVILE:—

This is an appeal against an order of the Supreme Court of the colony of *Victoria* which, upon a return to a writ of certiorari, quashed an order that had been made on the 18th of November, 1871, by the then Judge of the Court of Mines for the mining district of *Beechworth*, for the winding-up of the *Golden Gate Gold Company, Registered.* The Appellants are the *Colonial Bank of Australasia*, the creditors on whose application the winding-up order was made; and the official agent for the liquidation of the company under that order. The Respondent is one of the shareholders of the company.

This company was, in the month of May, 1865, incorporated under the provisions of the local statute passed in the preceding year (No. 228 of the 27th Vict.), and known as the *Mining Companies Limited Liabilities Act*, 1864.

It must be assumed that all the requirements of that statute were complied with; and, in particular, that a manager was appointed under the 6th section; that the company was duly registered in the Court of Mines for the district of *Beechworth* under the 9th section; and that it had, at least for some time, a registered office, to which all communications and notices might be addressed pursuant to the 15th section of the Act. There were several changes in the person of the manager, the last registered manager being a Mr. *William Scott.*

The office first registered was No. 37, *Market Street, Melbourne*, and that continued to stand on the register as the office of the company up to the date of the winding-up order.

That order was also made under the provisions of the *Mining*

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Companies Limited Liability Act, 1864, as amended in 1867 by a subsequent statute, No. 324 of the 31 Vict. It was made by the Judge of the district wherein the company was registered, and therefore by the Judge having general jurisdiction over the subject-matter.

Before they consider the grounds upon which the Supreme Court has made this order, their Lordships will deal with some objections that have been taken to the action of the Supreme Court in this matter.

It has been argued that the Supreme Court had no power to issue a writ of certiorari to bring up the proceedings of the Judge of the Court of Mines.

That the Supreme Court has a general power to issue the writ to any inferior Court in the colony, co-extensive with the like power of the Court of Queen's Bench in this country, is indisputable, and was finally admitted at the Bar.

It was, however, contended, 1st, that the Courts of Mines are not inferior Courts; and, 2ndly, that if they are inferior Courts, the power to issue a *certiorari* to them has been taken away by statute.

[His Lordship here stated the leading provisions of the local statutes of 1857, 1864, and 1865, which relate to the Courts of Mines (1).]

Upon a review of these different enactments, and the consideration of the arguments addressed to them, their Lordships have come to the following conclusions:—

1. That these Courts of Mines, which have been created by Acts of the local Legislature, and with a jurisdiction which, however wide, is limited both as to the persons and the matters within the colony over which it is to be exercised, must, on the principle laid down by Lord *Holt* in *Rex* v. *Inhabitants of* ——, in *Glamorganshire* (2), be taken to stand in relation to the Supreme Courts on the footing of inferior Courts; and

2. That the power to issue a certiorari to these Courts in respect of any proceeding under the *Mining Statute*, 1865, has been taken away by statute.

(1) *Supra*, pp. 422, 423.

(2) 1 Ld. Raym. 580.

It was, however, argued that a winding-up order made by the Judge of a Mining Court under the provisions of the *Mining Companies Limited Liability Act*, 1864, was not a proceeding under the *Mining Statute*, 1865, inasmuch as the latter contains no express reference to that particular jurisdiction, or to the orders made thereunder. And it therefore became material to consider whether an appeal to the Chief Judge of Mines against such an order could be preferred under the Act of 1865; since, if such an appeal would lie, the order itself would obviously be a proceeding under the Act. The words of the 172nd section are very general. They are "any party to any suit in any Court of Mines, or to any proceeding before the Judge of any such Court (except where the contrary is herein provided) who shall be dissatisfied with any decree or order of the said Court, or with the order of a Judge thereof, not being an order of commitment made by such Court or Judge, may appeal from the same to the Chief Judge." They are, therefore, wide enough to embrace an appeal by the shareholders of a mining company against an order made by a Judge of a Court of Mines for winding up the company upon such a proceeding as that prescribed by the 28th and following sections of the *Mining Companies Limited Liability Act*, 1864. And it may be remarked that the wording of this 172nd section differs herein from that of the 71st section of the repealed statute of 1857 (1), which gave an appeal from the decrees and orders of the Courts of Mines to the Supreme Court in terms that might well be taken to be confined to decrees and orders in regular suits. And it seems reasonable to suppose that the ampler terms of the more recent enactment were purposely used, in order to embrace the orders made under the provisions of the intermediate statute of 1864.

It may further be observed that the Act of 1867, which amended that of 1864, by its 4th section, expressly provided that "All orders made by the Court of Mines, or the Judge thereof, under any of the provisions of the latter statute, might be enforced in like manner in which any order or decree of the Court of Mines in any suit pending therein might be enforced;" and, consequently, expressly applied to such orders the machinery of executions con-

(1) *Supra*, p. 419.

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tained in the 4th subdivision of the second part of the *Mining Statute*, 1865.

Their Lordships are, therefore, of opinion that winding-up orders must be taken to be within the scope of the 244th section of the Act (1), and that the power to remove the proceedings relating to them into the Supreme Court has been taken away by statute.

It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.

Some of these authorities will be hereafter considered. At present it is sufficient to mention that of *Reg.* v. *St. Olave* (2), which supports both these propositions.

It does not, however, appear that the Supreme Court of *Victoria* has, in the present case, asserted the right to exercise powers in excess of what has been just laid down. Their Lordships understand the final judgment of that Court to state, as the grounds upon which the order ought to be quashed, that the Judge of the Court of Mines who made it had acted without jurisdiction, and that he had been misled into doing so by the fraud of the petitioning creditors. The question upon this appeal is whether the materials before the Court justified either conclusion. And as these two points, want of jurisdiction in the Judge, and fraud in the party procuring the order, are essentially distinct, it will be well to consider them separately.

In order to determine the first it is necessary to have a clear apprehension of what is meant by the term "want of jurisdiction." There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction

(1) *Supra*, p. 423. (2) 8 E. & B. 529.

depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide.

Accordingly, the authorities, of which *Reg.* v. *Bolton* (1), and *Reg.* v. *St. Olave* (2), may be taken as examples, establish that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found. Nor is anything to be found in the cases which have been cited at the Bar, or, so far as their Lordships are aware, in any other decided case, which is really inconsistent with the proposition just stated. In *Reg.* v. *Cheltenham Paving Commissioners* (3), the objection was that the Court which passed the order was improperly constituted, inasmuch as three of the magistrates who were interested took part in the decision. And *Reg.* v. *Recorder of Cambridge* (4), proceeds on the same ground.

(1) 1 Q. B. 66.
(2) 8 E. & B. 528.
(3) 1 Q. B. 467.
(4) 8 E. & B. 637.

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Again, in *Reg.* v. *Arkwright* (1), the objection was that certain notices which, on the true construction of the statute, ought to have preceded the inquiry, were not given until after the adjudication; and, consequently, that the order had been made in the absence of that which the Legislature had made an essential preliminary to the exercise of jurisdiction.

In cases which fall within the principles of the last-mentioned decisions the question is, whether the inferior Court had jurisdiction to enter upon the inquiry, and not whether there has been miscarriage in the course of the inquiry.

There is a third class of cases, in which the Judge of the inferior Court, having legitimately commenced the inquiry, is met by some fact which, if established, would oust his jurisdiction and place the subject-matter of the inquiry beyond it. To this category belong such cases as *Thomson* v. *Ingham* (2), which was much relied upon in the argument; *Pease* v. *Clayton* (3), and *Reg.* v. *Stimpson* (4). In all these cases the inferior Court, being incompetent to try a question of title, was bound to hold its hand when a *bonâ fide* dispute as to title arose before it. And the general rule in such a case is that stated in the passage from the judgment of the Exchequer Chamber in *Bunbury* v. *Fuller* (5), which is cited by Mr. Justice *Blackburn* in *Pease* v. *Clayton*. "It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior Court." And, accordingly, the cases shew that the decision of the inferior Court on such a point is examinable either on formal proceedings in prohibition, as in *Thomson* v. *Ingham* (2), or in an action of trespass, as in *Pease* v. *Clayton* (3), or on certiorari, as in *Reg.* v.

(1) 12 Q. B. 960.
(2) 14 Q. B. 710.
(3) 3 B. & S. 620.
(4) 4 B. & S. 301.
(5) 9 Ex. 111.

Stimpson (1). Whether the Court, in the latter case, would have exercised its summary jurisdiction by quashing the order if there had been evidence on which the magistrates might have reasonably concluded that the question of title was not raised *bonâ fide*, may be doubtful.

All these cases, however, leave untouched the authority of *Reg.* v. *Bolton* (2), and that class of cases; and the question is within which class the present case falls.

The first ground upon which the rule nisi to quash the winding-up order was granted was, that there was no jurisdiction to make the order, as at the time of serving the notice of demand, and of making the said order, the *Golden Gate Gold Mining Company, Registered*, was not indebted to the *Colonial Bank of Australasia* in any sum; and the judgment of the Supreme Court upon which this rule nisi was made absolute, found that "there was no petitioning creditors' debt proved, and that there was, therefore, no foundation for the winding-up order."

The order, however, of the 18th of November, 1871 (3), is, on the face of it, strictly regular. It recites that on the 11th of August, 1871, the *Colonial Bank of Australasia* had served on the mining company a demand, under their seal, requiring the company to pay the sum of £3223 11*s.* 8*d.* then due to the bank, and that the company had, for the space of three weeks succeeding the service of that demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the bank. It further recites that, on the 18th of November, 1871, the bank had presented their petition, setting forth the facts before recited, and praying that the company might be wound up; that an affidavit verifying the petition had been filed in Court; that the mining company had been duly served with a notice to appear and shew cause why the Judge should not make an order in the terms of the statute; that it had failed to appear or shew any sufficient cause as required by the notice; and states that therefore, upon the hearing of the said petition, and upon reading the said affidavit, and upon proof as well of the facts and matters aforesaid as that the said sum was then due from the said company to the said

(1) 4 B. & S. 301. (2) 1 Q. B. 66.
(3) *Supra*, p. 424.

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Colonial Bank of Australasia; and upon hearing counsel for the said bank, he (the Judge) ordered that the said company should be wound up forthwith. The order, then, was one made by a competent Judge; shewing, on the face of it, that every requirement of the statute under which it was made had been complied with; ordering that which the Judge, on proper grounds, had power to order; and containing an express adjudication upon a fact which, though essential to the order, the Judge was both competent and bound to decide, viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt.

This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a retrial of the question of the petitioning creditors' debt, and that upon evidence which was not before the inferior Court. To do this, and to quash the order upon a conclusion thus drawn, is clearly contrary to the principles established by *Reg.* v. *Bolton* (1) and that class of cases. Their Lordships are, therefore, of opinion that the order under appeal cannot be supported on the ground that there was no jurisdiction to make the order of the 18th of November, 1871, because no petitioning creditors' debt was proved.

The Respondent, however, also relies on the second ground stated in the order nisi, viz., that the sum mentioned in the winding-up order was not, nor was any part thereof, due to the bank by the mining company; and that the order was obtained by undue and improper means, calculated to deceive the Judge who made the same, and to prevent the company from shewing reasons to the Judge for refusing to make the order, and that so the order was obtained by fraud on the said Judge.

The case of fraud made by the affidavits, and insisted upon by the learned counsel for the Respondent at the Bar, is shortly this:— It is not disputed that, in May, 1866, the mining company had, by its manager or other person or persons professing to act on its behalf, overdrawn its account with a bank called the *Union Bank*, and that, on the 7th day of that month, it was resolved at a meet-

(1) 1 Q. B. 66.

ing, professing to be an extraordinary meeting of the shareholders, that the banking account should be removed from the *Union Bank* to the *Colonial Bank of Australasia*, and that Mr. *Hogarth*, one of the shareholders, should wait on the manager of the *Colonial Bank* and make arrangements with him regarding the over-draft to the *Union Bank*. Nor is it disputed that, in consequence of the arrangements so made, the *Colonial Bank* paid to the *Union Bank* the amount of the over-draft, and that the debt claimed to be due from this mining company at the date of the winding-up order was the amount so paid with the interest that had accrued thereon.

It was, however, contended that, inasmuch as there is no proof of any resolution sanctioning the borrowing of money except that of the 7th of May, 1866; and that resolution, if it implied such sanction, was passed at an extraordinary meeting of the shareholders which had neither been regularly convened nor duly advertised pursuant to the provisions of the 23rd section of the *Mining Companies Limited Liability Act*, 1864; there was an absence of that sanction to the borrowing of money which is required by the 21st section of the same Act; and, consequently, that the transaction with the *Colonial Bank* was not binding on the shareholders of the mining company; and the debt proved was not the debt of the company. It was further alleged that the bank having in the month of September, 1866, commenced an action against the mining company for the recovery of this debt, was met by a defence (the precise nature whereof is not stated on the affidavits), and after various postponements had failed to proceed further with that action.

It was further stated that the mining company had been "virtually defunct" since the 10th of June, 1868, having permitted its claim to be sold to another company; that the manager about that time ceased to be employed by the company, or to draw his salary; and that the name of the company was then or soon after taken down from No. 37, *Market Street*. And it was suggested, if not positively alleged, that the bank knowing all these facts, and with the object of obtaining the amount due to them, which they knew they could not recover in the actions, had fraudulently entrapped the Judge into making the winding-up order, by serving the demand and the notice required by the statute, and

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recited in the order upon the manager, and at the office of the defunct company; the notice being purposely framed so as to give the company an unusually short period within which to appear and shew cause against the making of the winding-up order.

Their Lordships, after a full consideration of the case as disclosed in the affidavits, and of the arguments addressed to them, are not satisfied that there is any ground for imputing fraud to the *Colonial Bank*. The gist of the supposed fraud is that the bank was seeking to recover from the shareholders, by means of these proceedings taken behind their backs, a debt for which they were not liable; and which the bank knew it could not otherwise recover against them. Their Lordships, however, are by no means prepared to say that the company (meaning thereby the shareholders) was not liable to repay to the bank the money which the latter had unquestionably advanced for the purposes of the company. The Respondent relied on the case of *Cherry and Another* v. *The Colonial Bank of Australasia* (1). In that case the Appellants, two of the directors of a mining company, had written a letter to the bank, stating that they had authorized *Clarke*, the manager, to draw cheques on account of the company. *Clarke* overdrew the account, and the company having repudiated their liability for the overdraft, the bank sued the Appellants on the warranty to be implied from their letter. The case proceeded on the assumption that *Clarke* had not such authority, and the directors were held to be personally liable on the implied warranty. There seems, therefore, to be nothing in that authority which governs the present case. On the other hand, the cases of *Royal Bank* v. *Turquand* (2); *Fountaine* v. *Carmarthen Railway Company* (3); and *Agar* v. *Athenæum Life Insurance Company* (4), are authorities for holding that it was not incumbent on the bank, before it advanced the money, to satisfy itself that all the proceedings of the mining company and its shareholders *inter se* had been strictly regular. The money so advanced was advanced at least two years before the mining company is alleged to have transferred its claim, or to

(1) 6 Moore P. C. C. (N.S.) 235; Law Rep. 3 P. C. 24.
(2) 5 E. & B. 248; 6 E. & B. 321.
(3) Law Rep. 5 Eq. 316.
(4) 3 C. B. (N.S.) 725.

have ceased to carry on business. It was advanced in order to free the company from an existing liability, the debt then due to the *Union Bank*, which the shareholders could not have resisted, if they could have resisted it at all, without destroying the credit of their company. Again, it appears from the affidavit of Mr. *Boully* that the action was suspended in consequence of negotiations with the shareholders for the payment of the debt; and, as regards the Respondent, it appears that on the 21st of June, 1867, he, as chairman of the board of management, signed a minute in which it was resolved, in answer to a letter from the bank demanding the debt, "that no steps be taken to arrange matters with the *Colonial Bank* until the amalgamation" (presumably the amalgamation with the other mining company), is finally completed. Their Lordships, therefore, are unable to affirm on a summary proceeding, at the instance of this Respondent, that the mining company were not liable to the bank for this debt, or that the bank must be taken to have known that they were not liable.

In this state of things it was unquestionably open to the bank, acting fairly, to abandon the further prosecution of the action, and to take the steps indicated by the latter part of the 28th section of the *Mining Companies Limited Liability Act*, 1864, in order to obtain an order for the winding-up of the company. In doing this it was bound, under the statute, to serve as it did the demand and the notice upon the registered manager at the registered office of the company. The company which had taken no steps formally to wind up its concerns, but had left the name of its manager and the description of the office to stand on the register, cannot be heard to say that the first was not its officer, nor the second its office. Then, can the shortness of the notice be treated as conclusive evidence of fraud? The judgment of the Supreme Court does not so treat it; and upon the application to set aside the order which was tried in August, 1872, before the Deputy Judge, Mr. *Bowman*, that notice was ruled to be legally sufficient. Nor does it appear that, if a much longer notice had been given to the manager, the shareholders and especially the Respondent would have acted upon it. On what then does the finding that the Judge was imposed upon by the petitioning creditors rest? They made a regular application for a winding-up order; they swore to

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a sufficient debt; they gave a sufficient notice to the opposite party, on whose failure to appear the order was made. Their Lordships cannot see that the bank was bound to inform the Judge that some of the shareholders were contesting their liability for this debt, on grounds of which it is sufficient to say that it is extremely doubtful whether they constitute a legal defence. Their Lordships are therefore of opinion that no fraud is established against the bank, and that that ground for granting the order also fails.

Their Lordships desire to add that, even if the conduct of the bank had been such as to raise in their minds a much stronger suspicion of unfairness, they would nevertheless have thought that the Supreme Court ought not summarily and on certiorari to have quashed the winding-up order on that ground. The Court of Queen's Bench, whose exercise of this jurisdiction is discretionary, would certainly not quash an order of an inferior Court upon the ground of fraud in the procuring of it, unless the fraud were clear and manifest. Here the question whether a fraudulent use had been made of the machinery for winding-up registered companies, was a complicated one, dependent on a variety of circumstances capable of explanation and requiring nice consideration. In such a case the parties, conceiving themselves to be aggrieved, ought to have been left to other and more formal remedies. Such remedies were open to them. Their Lordships cannot but think that, on a proper application, the Judge of the Court of Mines who made the order would, on a suggestion of fraud, have had power to review it. They are not satisfied that it might not have been reviewed generally by the Deputy Judge on the occasion of the application made to him in August, 1872, under the 3rd section of the Act No. 324, although both parties seem to have then concurred in thinking that, under that enactment, the order could not be set aside unless it had been made *ex parte*. Again, for the reasons before given, their Lordships are disposed to think that an appeal against the order to the Chief Judge of the Court of Mines would have lain; and lastly, it is clear that, failing any of the above remedies, if the bank had made a fraudulent use of the process of the Mining Court, the parties aggrieved might have had their remedy by regular suit in the Supreme or other competent Court.

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For the above reasons their Lordships are of opinion that the order of the Supreme Court quashing the winding-up order cannot be supported. And they will humbly recommend Her Majesty to reverse that order, and to direct that, in lieu thereof, an order be made discharging the rule to shew cause of the 22nd of November, 1872, with costs. The Appellants must also have their costs of this appeal.

Solicitors for the Appellants: *Gamlen & Son.*
Solicitors for the Respondent: *Paine & Hammond.*

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March 17, 20.

JAMES MARKE WOOD, THE YOUNGER, OWNER OF THE SHIP "BIRMAH," AND OTHERS . . . . . } APPELLANTS;

AND

GEORGE SMITH, AND OTHERS, OWNERS OF THE SCREW STEAMSHIP "CITY OF CAMBRIDGE" . . . . . } RESPONDENTS.

THE "CITY OF CAMBRIDGE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Compulsory Pilotage—Exemption from Liability under 17 *&* 18 *Vict. c.* 104, *s.* 388—*Duties of Pilot and Crew.*

When the employment of a pilot is within the provisions of s. 139 of the *Mersey Docks Consolidation Act*, 1858, such employment is compulsory.

The object of the master, when the vessel left the dock, was to get to sea as soon as he could, and he arranged with the pilot that the vessel should anchor in the *Mersey* for the night, but should go so far on the way as would enable her to cross the bar on the next morning's tide:—

Held, that the ship was proceeding to sea within the meaning of s. 139 at the time she left the dock, and that the anchoring was not a discontinu-

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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ance of her progress to the sea, but an act proper and reasonable to be done in the course of it.

The 138th section of the Act does not relate to the giving of extra remuneration to those pilots only who are voluntarily engaged.

It may happen that a pilot who is compulsorily engaged under the 139th section of the Act by a ship proceeding to sea, may, by the ship's detention in the river, become entitled to extra remuneration under the 138th section.

The doctrine laid down in *The Christiana* (1) and *The Lochlibo* (2) concerning the relative duties of pilot and crew, recognised and approved.

THIS was an appeal from the Court of Admiralty, in a cause of damage promoted by the Appellants, the owners of the vessel *Birmah*, and by the owners of the cargo laden therein, and by the master and crew, for their money, clothes, and private effects, against the screw steamship or vessel *City of Cambridge*, her tackle, apparel, and furniture, for the recovery of damages in respect of losses sustained by the Appellants by reason of a collision which happened between the *Birmah* and the *City of Cambridge* in the River *Mersey*, at about 2.30 A.M., on the 27th of February, 1873.

The facts of the case, the principal arguments urged, and authorities cited at the hearing of the appeal, are fully set forth in the judgment.

The appeal was argued by

Mr. *C. Butt*, Q.C., and Mr. *W. C. Gully*, for the Appellants.

Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*, for the Respondents.

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Judgment was delivered by

SIR MONTAGUE E. SMITH:—

This is a suit brought by the owners of the ship *Birmah* against the owners of the steamship the *City of Cambridge*, to recover the damages occasioned by a collision between the two ships. The collision was of a disastrous character, for the effect of it was that the *Birmah* with a valuable cargo was sunk.

The questions in the appeal relate to the construction of certain

(1) 7 Moore's P. C. Cases, 171. (2) 7 Moore's P. C. Cases, 430.

pilotage clauses in the *Mersey Docks Consolidation Act*, 1858, and to the relative duties of the crew and pilot who were on board the *City of Cambridge*.

The facts are, that the *Birmah*, a homeward bound vessel, had anchored in the *Mersey*, off *Egremont*. She was lying there at anchor at the time of the collision, and no blame is attributable to her. The *City of Cambridge* left the *Morpeth Dock*, on a voyage to *Calcutta*, at or about eleven o'clock on the night of the 26th of February in charge of a licensed pilot of *Liverpool*. She was fully equipped and prepared for sea. It appears that the pilot had been hired whilst the vessel was in the dock to take her out to sea, and he came on board and took charge of her before she left the dock. It had been arranged between the master and the pilot that the ship should not cross the bar on that night, but should go into the *Mersey* and be anchored there ready to cross the bar on the morning tide, and it is in evidence that the state of the weather was such that she could not have crossed the bar on the following morning's tide, unless she had been taken out of dock and placed in the *Mersey* so far on her way. The *City of Cambridge* having been taken out of the dock, was brought up opposite *Woodside Ferry*, and was there anchored by a single anchor, the port anchor. The vessel was swung first to the flood, and then to the ebb tide, but had not been brought to her proper state, end on to the ebb tide, when the pilot left the deck to go to the chart-house to lie down. Shortly afterwards the vessel took a heavy sheer, the effect of which was to throw her across the tide, and the strain upon her anchor broke the chain, and the vessel went adrift. There was a strong wind at this time, and a heavy tide running down, and the wind and tide were opposed. The ship's anchors and chains were of usual size and strength. The mate and a proper number of the crew were on deck. As soon as the cable parted, the mate went to the chart-house, which was under the bridge, to tell the pilot, who had left directions that he should be called in case anything went amiss. The pilot came at once upon deck, and finding the state of the ship, and that she was drifting broadside down the river, or nearly broadside, he thought the right course was to put her under steam and endeavour to bring her end on to the tide. He was not successful

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in that manœuvre, and he afterwards dropped the starboard anchor. That anchor did not hold. It appears to have nipped the ground only, and the pilot in that state of things allowed the vessel to drift down the river. He had her so far under command, that he used the steam power and the helm to avoid the various vessels which he passed in his downward course, but ultimately the vessel drifted between the *North Star* and the *Birmah*. He was able to avoid the *North Star*, but the vessel whilst so drifting was driven against the *Birmah* with such violence that the *Birmah* was sunk.

It was not disputed upon the argument that the collision was due to the negligence of some persons on board the *City of Cambridge*. There are two questions to be considered in the case: first, whether the employment of the pilot before and at the time of the collision was compulsory by law; and, secondly, assuming it to be so, whether the collision was attributable exclusively to the want of care or skill of the pilot.

Now it is admitted that the pilotage would be compulsory in this case, and that the owners would be entitled to the exemption from liability provided in the 388th section of the *Merchant Shipping Act* (1), if the circumstances were such as to bring the case within the 139th section of the *Mersey Docks Consolidation Act*, 1858. That section is ill drawn, and the construction of it is by no means free from difficulty. But it is the legislation under which the pilotage in the great river *Mersey* has been conducted for many years, and the construction put upon the clause has been, that when the circumstances bring a vessel within it, and the employment of a pilot is under its provisions, such employment is compulsory. The clause is this,—"In case the master of any vessel, being outward bound, and not being a coasting vessel in ballast, or under the burden of 100 tons, for which provision is otherwise made, shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot, who shall first offer himself to pilot the same, the full pilotage rate that would have been payable for such vessel if the pilot had actually

(1) "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

piloted the same into or out, as the case may be, of the said port of *Liverpool*, together with all expenses incurred in recovering the same.

The question is, whether this vessel was proceeding to sea, so that the employment of the pilot was compulsory, before and at the time of the collision. When the ship left the dock, the object of the master was to prosecute his voyage by getting to sea as soon as he could. It is true it had been arranged between the pilot and himself that the vessel should anchor in the *Mersey* for the night, but that was done to further the object of getting out to sea by going so far on the way as would enable her to cross the bar on the next morning's tide, which the vessel could not have done if she had remained in dock, or at least she could not have crossed it so early. Their Lordships think that under these circumstances the ship was proceeding to sea within the meaning of the Act at the time she left the dock, and that the anchoring was not a discontinuance of her progress to the sea, but an act proper and reasonable to be done in the course of it.

It was argued that the employment of the pilot fell under the 138th section, which relates, it was said, only to the voluntary engagement of pilots. That clause is, "If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at *Hoylake*, or in the River *Mersey*, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of 5*s*. and no more." This part of the clause no doubt relates only to the voluntary employment of a pilot; but the latter part of it relates not only to such voluntary employment, but to the extra remuneration to be given to a pilot when he is compulsorily employed under the 139th section. The proviso is this, "Provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river, but no such charge shall be made for the day on which such vessel being outward bound shall leave the River *Mersey* to commence her voyage, or being inward bound, shall enter the River *Mersey*." Now the pilot in the present case was not hired under the first part of this clause. His attendance was not required for the sole purpose of remaining on board during the time the vessel was riding at anchor. He was

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engaged to take the vessel to sea. The proviso in the section may be applicable to his remuneration, because, although he was hired to take the vessel to sea, if, in the course of taking her to sea, any delay took place by which she remained a day in the river, he would be entitled to the extra payment which is provided by that section. So far from such a payment being necessarily an incident of a voluntary employment only, it is obvious that the clause assumes that the pilot may be compulsorily employed; that the rate fixed for taking the vessel out to sea, which is fixed according to a scale having relation to the size of the vessel, may be insufficient to remunerate him; and provides when he is delayed for an extra remuneration. It by no means follows that the pilotage was not compulsory under the 139th section, because the pilot might be entitled to extra remuneration under sect. 138.

It was said that the 139th clause would not have been infringed if the employment of the pilot had been delayed until the vessel left her anchorage on the following morning. But if the employment be compulsory upon the vessel proceeding to sea, and a fixed remuneration to the pilot be also obligatory on the master, he surely must be entitled to have the services of the pilot at the commencement of, and throughout the vessel's progress to sea, so as to get the full benefit of the compulsory payment.

The view taken by their Lordships of this Act does not in the least conflict with the decisions in the *Attorney-General* v. *Scaith* (1) and *Rodrigues* v. *Melhuish* (2). Those were both cases of vessels remaining at anchor, intending to remain at anchor, and not instances of vessels proceeding to sea. In the case of *Rodrigues* v. *Melhuish*, this passage occurs in the judgment of the Lord Chief Baron *Pollock*. He says, "It was contended by one of the learned counsel on the part of the owners, that if a pilot were taken on board a vessel previous to her leaving the dock, whilst she was in the act of quitting it with the intention of going to sea, no step being necessary except the different operations requisite for her to go on, the vessel in such case would be said to be proceeding to sea. If this vessel had had all her cargo on board, and the master had been ready to get on board, and she had had everything ready to commence her voyage forthwith, and had left her berth with

(1) 13 Price, 302. (2) 10 Ex. 117.

that intention, it might no doubt have been said that she was proceeding to sea from the time she first left her berth." The case supposed by the Lord Chief Baron is very like the actual case here. Their Lordships think that the *City of Cambridge* was proceeding to sea from the time she first left her berth, and that there was no break in the continuity of her progress to sea after she so left it and before the collision.

The next question is whether, assuming the employment of the pilot to have been compulsory, the collision is solely attributable to the default of the pilot. Now the remote cause of the disaster was the vessel parting from her anchor by the breaking of the chain cable, and the proximate cause was allowing the vessel to drift down the river so as to come into collision with the *Birmah*. The breaking of the cable was caused by the vessel having sheered when being swung to the tide and bringing too great a strain upon the cable. This was found in the Court below to be mainly due to the improperly short length of cable which had been let out, sixty fathoms only. Allowing the vessel to drift in a crowded river like the *Mersey* was also found by the Court below to have been an improper and unskilful mode of managing the vessel which brought about the collision. It was also the opinion of the Judge of the Admiralty Court that this drifting of the ship was not a necessary consequence of the first parting with the anchor, inasmuch as there was sufficient steam-power at hand to have allowed of her being navigated into a safe anchorage.

Their Lordships see no reason to disagree with any of the above conclusions of fact, and they concur in the opinion of the Court below that the pilot is alone to blame for the mismanagement of the ship in the instances just referred to. Indeed, it was not disputed that the length of the cable proper to be let out, and the manœuvring of the ship after she parted with her anchor, were matters entirely within his province.

It was contended, however, that the master and crew were to blame or partly to blame in three respects. It was said the quartermaster ought not to have allowed the vessel to sheer when at anchor. It has been already stated that the pilot left the deck before she had fully swung to the tide. Upon this point the Court below found as follows:—"The Elder Brethren think also

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that the pilot was to blame for leaving the deck when he did; that he ought not to have gone away into the chart-room when she was three quarters swung to the ebb tide; he ought to have waited till she was fully swung, and himself superintended that manœuvre, and seen that her helm was properly put. He left her helm amidships. No blame attaches to the *City of Cambridge* with respect to the men that were left on deck; there seem to have been sufficient men and they were properly placed. It is to be observed, that when the vessel swung, the wind and tide were opposed, and no blame at all attaches, in the opinion of the Elder Brethren, with which I agree, to *Boyle*, the quartermaster, in the manœuvre which he effected. He executed the right manœuvre in counteracting the sheer the vessel had taken, and there was no delay in executing it,"—what he did was to starboard the helm,—"nor is there any reason to suppose that the pilot, if he had been on deck instead of in the chart-room, would have directed anything to be done different from what was done in his absence." Their Lordships concur in that finding.

Another ground of blame is that a good look-out was not kept by the crew when the vessel was drifting, and particularly that they did not report the *Birmah*. It is unquestionable that, as a rule, it is the duty of the crew of the ship to keep a look-out, and to assist in that way the pilot in charge. But in the present case the Court below have found that there was no want of look-out, and their Lordships agree with this finding. The master was on the bridge with the pilot, and the *Birmah* was seen and reported by him to the pilot, and both had her in view for a considerable time before the collision.

The only remaining imputation on the crew is, that as soon as the chain of the port anchor broke, the starboard anchor ought to have been at once let go. This may have been a right manœuvre, or it may be, that as the vessel was athwart the tide, it was better to use the steam at command, so as to get her head to the tide, as the pilot afterwards attempted to do. She was to some extent athwart the tide when she originally sheered and the cable snapped, and no doubt at the moment when the cable snapped her head flew still farther to the west. She was, therefore, to a great degree broadside to the tide at the time when it is suggested that

the anchor ought to have been dropped. But, however that may be, it was a manœuvre that was properly within the province of the pilot to judge of and direct. If he had not been at hand, it would have been the duty of the officers of the ship at once to have acted, and dropped the anchor, if it had been a proper measure; but in this case the pilot was at hand. It is true that he had gone to the chart-house to lie down, but he had given directions to be called if anything went amiss. In point of fact he felt the jerk caused by the snapping of the cable, and came to the chart-house door as soon as the mate, who instantly ran to him, reached it, and very shortly afterwards he was on deck. Now, although it would have been the duty of the officers of the ship to act at once if there had been immediate necessity for so doing, as, for instance, to prevent a collision which was imminent, their Lordships think it cannot be said that the emergency was so pressing, or the measures to be adopted so plain, that they were not justified in resorting to the pilot in charge of the ship when he was so near at hand. The dangers of a divided command are great, and must be taken into account in dealing with questions of this kind.

The relative duties of the crew and pilot were discussed in two cases, which are to be found in the 7th *Moore*. The first is the *Christiana* (1). In that case Mr. Baron *Parke*, in giving the judgment of the Committee, says: "The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only." Then there being a question about the neglect to set the stay sail and jib under the circumstances in which the ship was placed, the learned Judge says: "The pilot has unquestionably the sole direction of the vessel in those respects where his local knowledge is presumably required. The direction, the course, the manœuvres of the

(1) 7 Moore's P. C. Cases, 171.

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vessel when sailing belong to him; and the Trinity Masters therefore rightly decided that the neglect to set the stay sail and jib, after the *Christiana* was driven from her anchorage, was the fault of the pilot alone. It was also his sole duty to select the proper anchorage place and mode of anchoring and preparing for anchoring, as was held to be clear in the case of *The Gipsy King* (1). And in the case of *The Lochlibo* (2), Lord *Kingsdown*, in giving the judgment of the Committee in that case, it being a question whether the vessel ought to have sailed through the *Downs*, says: "It was contended at the bar that in this case the impropriety of sailing through the *Downs* was so manifest that the captain ought to have refused, in spite of the pilot's opinion, to permit the ship to proceed, but we cannot assent to this. It would be very dangerous to hold that there can be any divided authority in the ship with reference to the same subject; and whether the ship was to anchor or to proceed was a matter which we think belonged exclusively to the pilot to decide."

Their Lordships, therefore, have come to the conclusion that as regards this point of blame, none is properly imputable to the crew. Being of this opinion, it becomes unnecessary to consider the further point urged by the Respondent's counsel, namely, that this default, if established, was too remote from the immediate cause of the collision to render the Respondents liable for the consequences of it. But it is to be observed that in the interval between the time when the vessel parted from her anchor and the collision she was under the control of the pilot, who might, if he had employed the engine power at his command, have given her a new and independent course which would have avoided the collision.

In the result their Lordships will humbly advise Her Majesty that the judgment of the Court below ought to be affirmed, and this appeal dismissed, with costs.

Solicitor for the Appellant: *W. W. Wynne.*
Solicitors for the Respondents: *Gregory, Rowcliffes, & Co.*

(1) 2 Wm. Rob. 537. (2) 7 Moore's P. C. Cases, 430.

OVIDE ANTOINE RICHER . . . . . APPELLANT;

AND

EDMOND VOYER, OSWALD VOYER, SÉVÈRE VOYER, GEORGE CHAMPAGNE, AND CORDÉLIA VOYER, HIS WIFE; CASIMIR GILBAULT, AND ALBINA PARMÉLIA VOYER, HIS WIFE; AND ADOLPH MAGNAN (*tutor ad hoc*) TO ARTHÉMISE VOYER AND GEORGIANA VOYER, INFANTS . . . . . RESPONDENTS.

J. C.*
1874
April 24, 25; *May* 2.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Civil Code of Lower Canada—Essentials to Gift—Negotiable Instrument.

A bank certificate was given in the following form:—

"*Montréal*, 7 *Septembre*, 1863.

"*A. B. a déposé dans cette banque à intérêt à quatre pour cent par an, la somme de deux mille dollars, payable à l'ordre C. D., lors de la remise du présent certificat. Cette somme pour porter intérêt devra rester au moins trois mois dans cette banque, et le porteur de ce certificat ne pourra la retirer qu'après quinze jours d'avis, l'intérêt cessant du jour de cet avis.*"

Quære, whether this was a negotiable instrument under Art. 2349 of the *Civil Code of Lower Canada*.

Under the 776th Article of the *Civil Code of Lower Canada*, which provides that gifts of moveable property accompanied by delivery may be made and accepted by private writings or verbal agreements, the anterior possession of property which can be the subject of *don manuel* is equivalent to delivery at the time of the gift, although the former possession was for another purpose.

The maxim of the French law—*possession vaut titre*—held not to apply where an agent held possession of a bank deposit certificate standing in the name of his principal, and bearing the principal's indorsement, the production of which certificate was required by the bank whenever interest was paid.

The parol testimony of witnesses is admissible to prove the fact of gift in certain cases coming within the class of *dons manuels*.

In cases where formal authentication by notarial act is dispensed with, the Court will not support a gift except upon plain and conclusive evidence of

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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the agreement to give; especially where an agent sets up a gift from his principal, and mainly relies for proof of it upon the possession of a document which may have been originally intrusted to him for the purposes of his agency.

Reasons given by a Judge of a Court from which an appeal lies to the Privy Council ought to be stated publicly at the hearing, and communicated to the Registrar of the Privy Council.

Their Lordships will not look at notes merely communicated to one of the parties.

THIS was an appeal from a judgment of Her Majesty's Court of Queen's Bench for *Lower Canada*, whereby the Appellant was condemned to pay to the Respondents the sum of $2061.37, with interest thereon from the 7th day of June, 1867, until perfect payment.

The Appellant, who was an advocate by profession, was a grandson of a certain M. *Antoine Voyer* and of his wife, and managed their affairs. After the death of *Antoine Voyer*, his widow, to whom he had bequeathed all his property, appointed the Appellant, by a deed of procuration, dated the 19th of January, 1859, to be her procurator or attorney for all and every purpose (*procureur général et spécial*), and expressly empowered him on her behalf and in her name, among other things, to demand and receive all money which should belong to her, whether capital or interest, rents or other sums, and to bring and discontinue actions in Courts of law, and generally to administer her property and to act in all matters relating thereto in as full a manner as she herself could have done.

The Appellant, as such agent, on the 7th of September, 1863, deposited at interest with the *Banque du Peuple*, at *Montreal*, the sum of $2000 belonging to his grandmother, and received from the said bank a deposit certificate, of which the following is a translation:—

"No. 249. *La Banque du Peuple, Montreal.*

"7th September, 1863.

Part 4

"*O. A. Richer*, Esq., has deposited in this bank at interest at 4 per cent. per annum the sum of $2000 dollars, payable to the order of *Dame Marie Anne Ste. Marie* [this was the maiden name of Madame *Voyer*, and appears to have been her legal designation], upon the surrender of the present certificate. This sum

in order to bear interest must remain at least three months in this bank, and the bearer of this certificate will only be able to draw it out after fifteen days' notice, the interest ceasing from the day of such notice."

Some time in the same year, 1863, Madame *Voyer* wrote her name across the back of the certificate, and from that time down to the time of her death, and thenceforth until it was paid by the bank, it was always in the possession of the Appellant and in his own house.

Madame *Voyer* died on the 19th of April, 1867, and the Appellant, as the bearer of the said certificate of deposit, demanded from the said bank payment of the said deposit and interest on the 7th of June, 1867; and upon proof of the signature of the said Madame *Voyer*, and after satisfying the bank that the said deposit was not disposed of by her will or codicil, giving to the bank his own cheque for $61.37, being the amount of interest then due on the deposit, and indorsing the certificate in his own name, the Appellant received the sum of $2061.37, being the total amount of principal and interest due on the said deposit certificate. This sum the Appellant claimed to retain as his own.

By her will, dated the 30th of November, 1859, Madame *Voyer* gave certain lands and a sum of money, the usufruct thereof to be enjoyed by her daughter, Madame *Richer* (the Appellant's mother), during her life, and the absolute interest thereof to belong, after her decease, to her children, including, in express terms, the Appellant. The said testatrix further gave to her said daughter absolutely certain furniture, and then devised to the Appellant absolutely a parcel of land in *Montreal*, in order, as she declared, to recompense him for the services which he had rendered to her and to her said late husband, and as a token of gratitude for the same (*pour le récompenser des services qu'il m'a rendus et qu'il a rendus à mon défunt mari, et pour lui en témoigner ma reconnaissance*).

The testatrix further gave certain lands for the use of her daughter, Madame *Beaudry*, during her life, and after her decease to her children, in equal shares absolutely, and the usufruct of certain other lands to the grandchildren of the testatrix—children of her deceased son, *Antoine Toussaint Voyer*, viz.: the Respon-

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dents, *Edmond Voyer*, *Oswald Voyer*, *Sévère Voyer*, *Cordélia Voyer*, *Albina Parmélia Voyer*, *Arthémise Voyer*, and *Georgiana Voyer*, and *Emery Voyer* (since deceased in the lifetime of the testatrix) during their respective lives.

Madame *Voyer* also by her will gave to *Amanda Voyer* sister of the said Respondents, during her life the income of £250 Canadian currency, part of the capital stock of the said *Banque du Peuple* belonging to her, the testatrix; and after the death of the said *Amanda Voyer*, she bequeathed the capital of the said £250 (currency) stock, to the children of the said *Amanda Voyer*, and in case she should leave no issue, then to her brothers and sisters absolutely: and she further directed her executor to purchase £250 (currency) stock, to be settled on *Avila Voyer*, brother of the said Respondents, for his life, and his children after his decease in like manner, and provided that in case he should leave no issue the said last mentioned stock should be divided among his brothers and sisters equally.

The testatrix by her will expressly declared that none of the persons to whom she had given usufructuary interests should be able to alienate or incumber the same under any pretext, and she appointed the Appellant executor of her said Will.

The said Madame *Voyer*, by a deed of gift, dated the 19th of February, 1863, conveyed to the Appellant absolutely the said parcel of land devised to him by her said will, which was worth about £1000 or £1200 (currency). By this deed, Madame *Voyer* declared that such gift was in recompense for services rendered to her late husband and herself by their said grandson (*pour récompenser le dit Ovide Antoine Richer des services qu'il a rendus à la dite donatrice et au dit feu Antoine Voyer, et pour lui en témoigner sa reconnaissance*).

On the 1st of December, 1865, Madame *Voyer* made a codicil to her will, whereby, after reciting that she had given a sum of money to *Avelina Richer*, the sister of the Appellant, she declared that that sister should not share with the other children of Madame *Richer* in the gifts made to such children by the said will, but in all other respects the said testatrix confirmed her said will. Madame *Voyer* died on the 17th of April, 1867, without having revoked or altered her will, except so far as the same was altered

by the codicil thereto, leaving all the persons named in her will as devisees and legatees her surviving, except her grandson *Emery Voyer*, who had died in her lifetime.

The Appellant, by deed duly registered, and dated the 24th of April, 1867, renounced the executorship of the will.

The action which gave rise to this appeal was commenced by the Respondents as Plaintiffs, against the Appellant as Defendant, on the 28th of April, 1868, to recover from him the said sum of $2061.37, with interest thereon, from the 7th of June, 1867. The declaration in the action, besides stating shortly the said will, alleged that the Mdmes. *Richer* and *Beaudry* (therein called *Anathalie Voyer* and *Tharsile Voyer*), the daughters of the testatrix, had accepted the gifts made in their favour and had been put into possession thereof under the will, thereby in effect renouncing their title as heirs of the testatrix; and that for this reason, and in consequence of various events set forth in the declaration, the Respondents were her only heirs; and it claimed both principal and interest as part of the estate of Madame *Voyer*.

The case made by the Appellant (irrespective of an objection to the suit being brought in the absence of Mesdames *Richer* and *Beaudry*) was, that he had managed for many years without salary the pecuniary affairs of his grandfather and of his grandmother, giving up his profession for the purpose soon after the date of the deed of procuration; that the indorsement and delivery to him of the certificate was intended by Madame *Voyer* to pass, and did pass, the beneficial interest in the deposit money to him for his own benefit; that he upon four occasions, viz.:—the 9th of March, 1864, and the 16th of January, the 9th of March and the 19th of December, 1866, drew from the bank interest due upon the deposit, and applied the same to his own use, without accounting for the same to Madame *Voyer*.

He also alleged (and adduced some evidence in support of the statement) that all the documents belonging to Madame *Voyer* were kept by her up to the time of her death in the house where she was residing, namely, that of Madame *Richer*, who produced them, and they were not in the possession or custody of the Appellants, whereas the certificate was in his possession; that the banker's certificate was by mercantile custom regarded as a

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negotiable instrument transferable by indorsement; that Madame *Voyer* and her husband had received much aid from the Appellant, and had much affection for him, and that Madame *Voyer's* mind was strong to the last. One of the witnesses, M. *Bibaud*, deposed that Madame *Voyer* had declared that she had abandoned the certificate and the deposit money in question in favour of the Appellant to recompense him for his services, and no longer claimed any property in the document which he had in his hands. An objection was raised to the admissibility of M. *Bibaud's* evidence, as tending to prove by parol facts which under the Canadian law are not capable of being so proved. This objection will be noticed below.

The Appellant objected to the suit, that all the heirs of Madame *Voyer* were not parties to it; that Mesdames *Richer* and *Beaudry*, who were absent, were to be reckoned among the heirs.

The Respondents, suing as the heirs of Madame *Voyer*, insisted in effect that the Appellant had possession of the certificate not as owner but merely as attorney for his grandmother, and that her indorsement and signature were necessary to enable him as such attorney to draw the interest accruing due on the deposit; that the instrument was not negotiable, and the deposit could only be made the subject of gift with the formalities prescribed by law, which had not been observed; that no such gift *inter vivos* as was alleged by the Appellant was ever made to him, and that the parol evidence tendered by him was not receivable by law; that his services had been amply rewarded by the gift of land; that the Appellant had borrowed money at 8 per cent. for the purpose of erecting houses on the land given him by Madame *Voyer*, which would not have been done by him while interest was running on the deposit at the rate of 4 per cent. only, if he had regarded himself as the owner of the deposit of $2000.

The Appellant being examined on interrogatories by the Respondent deposed that since the gift of the land to him he had enjoyed the income thereof, and built houses thereon, at a cost of $4758, as shewn by the building contract therewith filed as part of his answer, and that he had not borrowed any money except $1200 which he borrowed when the houses were being built, at 8 per cent. interest; that his grandfather had never given him any presents

except small sums, not amounting to $300 in the whole, and paying for part of his college education in like manner as he (the grandfather) had done for others of his grandchildren, including some of the Respondents; that before the 7th of September, 1863, he (the Appellant) had not received any gifts from Madame *Voyer* except the said land and about $200; and that he had never accounted to her for the interest received by him on the deposit, but had on the first occasion of his drawing part thereof, and in order to please her, offered her the amount, when she answered "keep it, it is yours."

The "Superior Court" on the 6th of June, 1868, dismissed the Respondents' action with costs, but the Court of Revision on the 27th of February, 1869, decreed in favour of the Respondents, reversing the decision of the Court of first instance, and on a further appeal the Court of Queen's Bench of Lower *Canada* on the 7th of November, 1870, upheld the decree of the Court of Revision.

The material part of the reasons assigned for the judgment of Mr. Justice *Caron*, in which the other Judges of the Court of Queen's Bench concurred, were as follows:—

"*Je pense que le jugement de la Cour de Révision devrait être confirmé, et le Défendeur condamné à remettre la somme réclamée. Mes raisons sont:*

"1. *L'endossement du certificat de dépôt, fait le jour même de ce dépôt, ne présage pas un don, mais bien un moyen de mettre le déposant en état de recevoir les intérêts à mesure qu'ils seraient dûs.*

"2. *Cet endossement fait peu de temps après un don considérable de terrain* (£1500) *fait par Dame Voyer à l'Appelant en récompense de ses services.*

"3. *La banque prouve que l'endossement était nécessaire pour l'autoriser à recevoir les intérêts.*

"4. *Si l'argent, produisant* 4 *pour cent, lui appartenait, pourquoi ne pas le retirer au lieu d'emprunter pour bâtir à raison de* 8 *pour cent, comme il est prouvé qu'il a fait?*

"*Sans cela il était bien déjà récompensé de ces services.*

"5. *Il a déposé comme procureur, c'était à lui à établir le changement dans son titre et sa position.*

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"*L'endossement seul et dénué d'explication n'a pas cet effet.*

"6. *Ce n'est que longtemps après le décès qu'il fait connaître ses prétentions, tenues secrètes jusque là, et qu'il retire son dépôt de la banque.*

"7. *La preuve de Bibaud est inadmissible, illégale et insuffisante.*

"8. *Aucune autre preuve du don.*

"9. *Que sous toutes les circonstances pour réussir, le Défendeur aurait dû produire une toute autre preuve que celle qu'il a produite.*"

Her Majesty in Council having granted to the Appellant leave to appeal against this decision of the Court of Queen's Bench, the appeal now came on to be heard.

Mr. *A. Wills*, Q.C., and Mr. *Westlake*, Q.C., for the Appellant:—

It is in evidence that the Appellant rendered valuable serviaes to Madame *Voyer*, that she was attached to him, and said that she would reward him, and said that she had given him the fund represented by the certificate; which was not an excessive gift. Her mental faculties were strong. The proof of the gift is complete. There is indeed no evidence to shew precisely when the gift was made, for the Appellant was placed at great disadvantage by the enforcement of the rules of the *Lower Canada Code of Civil Procedure*, Arts. 251, 271, under which he was merely examined upon interrogatories, and was not allowed to give his own evidence fully or to explain himself. But the delivery and indorsement are certain, and it appears from the facts, as well as parol evidence, that they were made by way of gift. It is laid down in the *Civil Code Lower of Canada*, Arts. 1233, 53, that parol evidence is not admissible unless there has been a commencement of proof in writing. But these articles are in the chapter on Obligations, and parol is not excluded in such questions as this, of gift. (Arts. 1706 and 761); but even supposing Arts. 12, 33, and 53, to be applicable, a sufficient commencement of proof is made in this case: *Toullier*, vol. ix., pp. 81–3; *Bonnier*, *Traité des Preuves* [2nd Ed.], p. 134; *Pothier*, vol. ii., p. 430 [Ed. *Bugnet*]; the issue being whether the dollars belong to the Plaintiff or to the Defendant, the indorsement of Madame *Voyer* is a commencement of proof in writing. Article 776 of the *Lower*

Canada Code does provide for a verbal gift with delivery, (1). Articles 777 and 795, of gifts *inter vivos*, refer to gifts by deed, and both are taken bodily from the *Code Napoléon*.

According to *Pothier*, the delivery of the thing given is required by law, not to insure publicity, but irrevocability: *Pothier*, vol. i., pp. 351, 359; vol. viii., pp. 373, 377. The *Code Napoléon* prescribes the employment of notarial acts in making a gift, but the commentators say that this does not affect the old French common law, which makes a gift good without notary or formalities. *Demolombe* on Art. 931 of the *Code Napoléon*. The old maxim embodied in the *Code Napoléon*, Art. 2279, *possession vaut titre*, is referred to by every text-writer.

It will be said that by the law of *Lower Canada* Gift is Contract, but that is only where there is something to be performed and an obligation results from the gift. The formalities which the Canadian law prescribes in the case of gifts do not apply to things merely moveable, such as negotiable instruments; and there is evidence that these certificates are regarded as negotiable instruments, passing of course by indorsement and delivery. All the attributes of commercial paper have been established in the first instance by evidence of custom, and here is ample evidence of the negotiability of the certificate, and it is not contradicted: *Waithman* v. *Elsee* (2); *Walker* v. *Roberts* (3); *Woodhams* v. *Anglo-Australian Company* (4); *Wood* v. *Dean* (5); *Hammond* v. *Smith* (6).

The interest no doubt is only to be paid on condition that the deposit continues for three months certain, and the interest ceases for the fifteen days between notice and payment, but there is no uncertainty, and the latter stipulation only makes it payable fifteen days after sight. It is always implied in a promissory note that it shall be presented in order to get the money. There is no promise to pay interest except when the note is paid off; but the

(1) "Deeds containing gifts *inter vivos* must, under pain of nullity, be executed in notarial form, and the original thereof be kept of record. The acceptance must be made in the same form. Gifts of moveable property accompanied by delivery may, however, be made and accepted by private writings or verbal agreements."

(2) 1 C. & K. 35.

(3) C. & M. 590.

(4) 3 Giff. 238.

(5) 3 B. & S. 101.

(6) 33 Beav. 452.

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bank did actually pay it half-yearly. Cheques are not subject to the law of donations, because they are a mere authority to pay: *Parsons* on Promissory Notes and Bills of Exchange, vol. i. p. 26. The money itself was in the bank and could not be delivered, but the Appellant was put in possession as far as it was possible, for he was then able to take the money out of the bank. The instrument of procuration would have enabled the Appellant to draw the interest, so that indorsement was not necessary unless a gift was intended.

The time of the gift is immaterial. The presumption is that it took place at the time of the indorsement and delivery; but even if it was first indorsed to the Appellant as manager only, and Madame *Voyer* afterwards gave it to him for himself, the gift is equally good. The direction of the proprietor can change the cause of possession; that which a person has begun to hold as manager he may retain as owner.

The Respondents are not the only heirs of Madame *Voyer*, the testatrix. Mesdames *Richer* and *Beaudry* were among her next of kin, and have not renounced the inheritance, unless that is the legal effect of their having accepted their legacies. The incompatibility of the characters of heir and legatee is deduced from the *Code Civil of Lower Canada*, Art. 712, which was new law introduced by the *Code*, and is, in fact, a textual reproduction of Art. 843 of the *Code Napoléon*. *Merlin, Questions de Droit, vo.* '*Rapport à Succession*,' shews that notwithstanding the terms of the last-cited article, the testator's intention to allow the combination of the character of the heir and legatee is permitted in *France* to be deduced from the context of the will, and that it would be deduced from the context of such a will as this. The Canadian Parliament must be supposed to have adopted the article together with the known French interpretation of it.

Mr. *Watkin Williams*, Q.C., and Mr. *Fullerton*, for the Respondents:—

The instrument was not negotiable, and the property could not be transferred to the Appellant, except in the manner prescribed by the *Code*, especially considering that he was the owner's man of business; if not negotiable, it was a mere authority to recover

money, and could only pass with the formalities required in gifts of immoveable property, and all the banker's evidence is consistent with the view that it was a bare authority, a certificate of the existence of a deposit not to be withdrawn without notice: *Patterson* v. *Poindexter* (1).

By Art. 776, the gift must be accompanied by delivery—mere possession is not enough. Delivery could only be made according to the forms of law, which are strict. The delivery was made to the Appellant merely as agent and manager, and there is nothing to shew that the custody ever assumed a different character.

No notice of any transfer was ever given to the bank. After the lady's death the bank naturally deferred payment till they could learn whether the $2000 had been disposed of by her will. This shews that they did not regard the property as transferred to the Appellant by the indorsement. The possession of the Appellant as agent could not be privately changed to possession on his own account.

The parol evidence is inadmissible, as no foundation is laid for it, and even if admitted, it does not prove a present gift. It only states that she spoke of having given him the property, and is quite indefinite. The Judges rather set aside the parol evidence of the gift as inapplicable, than excluded it as inadmissible, and they disregarded the commercial evidence that the instrument was negotiable.

The spirit of the Canadian law is opposed to the issue of paper currency by the banks.

If Madame *Voyer* wanted to give him the money, she might have handed it to him instead of having it deposited in her own name, and when she gave it to him, he might have drawn it and re-deposited it in his own name. The Appellant was her sole manager, and it is not shewn how he rendered his accounts. The assertion of the Appellant that he offered the first interest received by him to Madame *Voyer*, is inconsistent with the statement that she had before that time given him the money represented by the certificate; and as acceptance is essential (2) to the completion of a gift, it proves that he had not accepted the gift, if offered pre-

(1) 6 Watt's and Sargent's Pennsylvania Rep. 227.
(2) Low. Can. Civil Code, 776.

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viously on the occasion of her indorsing the instrument, and he only represents her as having told him to keep the interest, not the capital. His borrowing $1200 at 8 per cent. while the $2000 was yielding only 4 per cent., shews that he did not regard the $2000 as his own. Although he held a power of attorney which might have entitled him to receive the interest, yet the bank may for their own satisfaction have desired to have Madame *Voyer's* signature. The deposit was made on the 7th of September, 1863, only half a year after the land had been given to him by a formal deed, expressly by way of recompense for his services, and the profits of the land became his at once.

By the Canadian law, this transaction falls under the head of obligations, and therefore parol evidence is excluded except where there is a commencement of proof by written evidence. Commencement of proof must be some evidence in favour of the proposition in issue. By Article 808, s. 4, of *Civil Code of Lower Canada* a gift need not be registered where there is actual delivery and public possession of it; but the Appellant had possession only as manager. It is not shewn that at any specific period the nature of his possession was altered. By reason of the *rapport*, the parties here are the only heirs; the other heirs having accepted their legacies (1).

Mr. *Wills*, in reply:—

It is not necessary that the gift should precede the delivery; *Ricard*, vol. i. p. 238, Nos. 891, 928; *Demolombe*, on Donations, [3rd Ed.], vol. iii., p. 72; *Code Civil*, pp. 49, 67, 931. As to borrowing $1200 at 8 per cent. while the $4000 were lying in the bank, it is not uncommon to leave particular funds untouched; probably the $1200 were charged upon the property. It appears from the factum of the Appellant that he had to borrow $3200 in all, and that he actually did borrow $1200. He required, therefore, the amount of the deposit also, and he probably took it out of the bank to make up the whole sum. The Appellant twice settled accounts personally with his grandmother. He had no papers of hers in his custody besides this certificate. Although she had presented him with the certificate, he might have offered

(1) See further the two last paragraphs of the judgment, *infra*, p. 480.

the interest out of delicacy, to give her an opportunity of reconsidering her gift. The law of registration, Arts. 806, 808, 809, 2082, applies only to gifts by deed. Parol gifts are not required to be registered; and even where registration is required, the want of it does not invalidate the transaction; but merely gives priority to those which are registered first.

The judgment of the Court was delivered by

SIR MONTAGUE E. SMITH:—

This is an action brought by the heirs of Madame *Voyer* against M. *Richer*, the Appellant, to recover a sum of $2000, deposited on behalf of Madame *Voyer* in the *Banque du Peuple* of *Montreal*, upon a certificate of deposit payable to her order, and which sum the bank paid to the Appellant after Madame *Voyer's* death.

The defence was that Madame *Voyer* had transferred the certificate, which was said to be a negotiable instrument, to the Appellant, by indorsing and delivering it to him as a gift. And whether there was a valid gift of this certificate and of the deposited money is the principal question in the appeal.

The Judge of the Superior Court decided this question in favour of the Appellant, and dismissed the suit, but his judgment was reversed by the unanimous decision of three Judges in the Court of Revision, which was affirmed on appeal by the unanimous judgment of the Court of Queen's Bench.

The Appellant was a grandson of Madame *Voyer*. He was an advocate, and had managed the property of his grandfather, M. *Voyer*, and, after his death, continued to manage it as the agent of Madame *Voyer*. It is said the management of this property, which produced a yearly income of £700 or £800, took up much of his time, and there is no reason to doubt that he conducted it to the satisfaction of both his grandfather and grandmother. By her will, dated the 30th of November, 1859, Madame *Voyer* bequeathed to him a piece of building land at *Montreal*, declaring it to be to recompense him for the services he had rendered to her and her late husband, and to mark her gratitude for them. Some time afterwards she anticipated this bequest by making a gift of the land to the Appellant by a deed in due

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notarial form. This deed bears date the 19th of February, 1863, and contains a similar declaration to that in the will, that the gift was made to recompense the Appellant for his services.

It is material to state that, soon after her husband's death, Madame *Voyer*, by a deed of procuration, dated the 19th of January, 1859, appointed the Appellant, whom she describes as "*avocat*" to be her "*procureur général et spécial*," with full power, for her and in her name, to manage her affairs and receive moneys due to her.

The $2000 were deposited in the bank by the Appellant, as the agent of Madame *Voyer*, on the 7th of September, 1863. The account was opened in her name, and so remained up to the time of her death.

The certificate of deposit is as follows:—[His Lordship here stated the terms of the certificate (1).]

It appears from indorsements on the document that four payments were made on account of interest in Madame *Voyer's* lifetime.

This certificate has the signature of Madame *Voyer* indorsed on it, and it is not disputed that it was handed by her to the Appellant so indorsed. The time when this was done does not appear; but there is a reasonable presumption that it was before the time when interest was first received, viz. the 9th of March, 1864, since it was the custom of the bank to require the indorsement before paying it.

It is stated by the Appellant, in his answer to interrogatories, that he never accounted to Madame *Voyer* for the interest on the deposit, and there is no evidence that he did; but he makes a statement, strongly relied on by the Respondents as inconsistent with his assertion of an absolute gift, to the effect that, when the first interest was received, he offered it to Madame *Voyer* with the view of giving her pleasure, and she answered, "*Garde-les, ils sont à toi.*"

It appears that the Appellant built houses upon the land given to him, and required money to pay the builder; and that he borrowed a sum of $1200, for which he paid interest at the rate of 8 per cent., whilst the deposit of $2000, which he alleges to

(1) See p. 462, *supra*.

have been his own money by his grandmother's gift, was lying in the bank at 4 per cent. only.

Madame *Voyer* died on the 17th of April, 1867, and the Appellant, on the 7th of June following, obtained payment of the $2000 and interest from the bank.

There is an entire absence of evidence to prove what took place when Madame *Voyer* indorsed the certificate.

Before referring to the questions of law which have been argued, it is right to point out that the title of the Appellant must rest on donation only. His services may supply motives for a gift, but were rendered in such a way that no contract to pay for them can be implied.

The 776th Article of the *Code* relates to the form of gifts *inter vivos*:—"Deeds containing gifts *inter vivos* must, under pain of nullity, be executed in notarial form, and the original thereof be kept of record. The acceptance must be made in the same form. Gifts of moveable property accompanied by delivery may, however, be made and accepted by private writings or verbal agreements."

There being no notarial instrument of gift, the Appellant, to establish his defence, must prove two things—(1) a delivery of the property, and (2) an agreement of gift.

On the first point his case is, that the certificate is a negotiable instrument, capable of being the subject of *don manuel*, and that his possession of it, indorsed by Madame *Voyer*, satisfies the requirement of the law as to delivery.

Much discussion took place at the Bar on the true nature of this document. On the one side it was said that it had all the attributes of a promissory note; on the other, that it was an acknowledgment only of the deposit, and that the indorsement was no more than an authority to the holder to receive the money, which, unless coupled with an interest, would be revokable. It appears that certificates of this kind are in common use among bankers in *Canada* and the *United States*, and considerable discussion has taken place in those countries as to their legal character. The American and Canadian law does not apparently differ from that of *England* with respect to the essential qualities of a promissory note. Article 2344 of the *Canada Code* thus

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defines it:—"A promissory note is a written promise for the payment of money at all events, and without any condition. It must contain the signature or name of the maker, and be for the payment of a specific sum of money only. It may be in any form of words consistent with the foregoing rules."

The word "payable" in the certificate in question unquestionably imports a promise to pay the sum deposited, and interest at 4 per cent., and "*à l'ordre*" are the apt words to constitute a negotiable instrument transferable by indorsement (see Art. 2286). So far the essential attributes of a negotiable promissory note are obtained; but it was said that the provisions that the money should not carry interest unless it remained at least three months in the bank, and that the holder of the certificate should not withdraw the money until after fifteen days' notice, the interest ceasing from the day of notice, imported conditions and contingencies incompatible with the certainty required in such an instrument. The answer given to this objection was, that the provision as to interest only prescribed the time when it was to commence and cease; and that the stipulation for fifteen days' notice introduced no more uncertainty into the promise than occurs in a bill payable so many days after sight.

With regard to authority, the Respondent's Counsel relied on a decision in *Pennsylvania*, in which the Court held that certificates of this nature are not negotiable: *Patterson* v. *Poindexter* (1). On the other hand, the Appellant's Counsel referred to an American text writer of high authority, Mr. *Parsons*, who, in his Treatise on Promissory Notes and Bills of Exchange, after stating that certificates of this nature were in common use and had given occasion to much discussion, and after referring to numerous cases containing conflicting decisions, and among them *Patterson* v. *Poindexter*, says: "We think this instrument (of which he gives the form) possesses all the qualities of a negotiable promissory note, and that seems to be the prevailing opinion" (vol. i., p. 26). It is to be observed, however, that the form given by Mr. *Parsons* omits the provisions as to interest and notice which appear in the present certificate.

From the evidence given by bankers and others who were called

(1) 6 Watts and Sargent, 227.

in this case to prove a custom, it certainly appears that these certificates have been commonly treated as transferable by indorsement, but whether with recourse to the indorser does not appear.

If it were essential to the decision of this appeal to determine the vexed question of the nature of this certificate, it would, of course, be their Lordships' duty to do so; but in the view they take of the second branch of this case they are relieved from this necessity. It is enough, therefore, for them to say of a document not in use in *England*, and which has been the subject of conflicting decisions in *America*, that there is high authority in favour of the Appellant's construction of it, and they will assume, in dealing with the rest of the case, that his contention on this point is well founded.

It was farther contended for the Respondent that the delivery was ineffectual in point of law, on the ground that it was made some time before the alleged gift, and with another object. The point was fully and ably discussed at the Bar, with the result that it appears to be the law of *Canada* that anterior possession of property which can be the subject of "*don manuel*" is equivalent to delivery at the time of the gift, although the former possession was for another purpose. (See *Richard, Traité des Donations*, chap. iv., sec. 2, dist. 1.)

Demolombe is very clear upon this point. He says: "*La donation manuelle pourrait même s'opérer sans tradition ('etiam sine traditione,' disait Justinien), si celui auquel le propriétaire de certains objets mobiliers veut les donner se trouvait déjà en possession de ces objets à un autre titre; la seule déclaration du donateur qu'il entend les lui donner, suffirait sans qu'il fût besoin d'en dresser un acte; la tradition, en effet, n'est que le moyen de transférer la possession; et ce moyen est parfaitement suppléé par la déclaration du propriétaire qui change la cause de la possession antérieure; la donation s'accomplit donc alors sans tradition mais non pas certes sans possession.*" (*Traité de Donations*, vol. iii., livre iii., titre 2, chap. 4, sec. 73.)

Assuming, then, there was a sufficient delivery of the certificate to satisfy the requirement of the law, the next question to be considered is, whether the agreement of gift is proved. On this point the indorsement and delivery are equivocal facts, consistent by

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themselves with the position of the Appellant either as agent or donee. It was, indeed, contended that, as he held a power of attorney, the indorsement was not required to enable him to receive the interest, but the bank, notwithstanding this was so, may have desired to have Madame *Voyer's* own signature.

Mr. Justice *Caron*, in his reasons, has tersely stated the Appellant's position:—"*Il a déposé comme procureur, c'est à lui à établir le changement dans son titre et sa position. L'endossement seul et dénué d'explication n'a pas cet effet.*"

The Appellant attempted to prove that the certificate was the only document of Madame *Voyer* he had in his possession, and that she kept all others in her own custody. The evidence of this fact is weak; but, assuming it to be proved, it would not conclusively negative the presumption that he held it as her agent. It is plain the bank required the production of the certificate whenever interest was paid, to enable an indorsement of the payment to be made upon it. Under these circumstances the maxim of the French law "*la possession vaut titre*" cannot be invoked with effect.

The evidence of the gift thus becomes reduced to the testimony of witnesses who speak to conversations with Madame *Voyer*.

Exception was taken by the Respondents in the Courts below to the admissibility of this evidence, and it seems to have been rejected; but whether on the ground that it was wholly inadmissible, or was deemed to be, when examined, irrelevant as affording no proof of a present gift, does not appear.

It seems to their Lordships that the parol testimony of witnesses is, of necessity, admissible to prove the agreement in certain cases coming within the class of "*dons manuels*," since it would be incompatible with the law, which allows such gifts to be made by verbal agreement, to exclude the only evidence by which such an agreement can be established.

But, assuming the testimony given in this case to be fully admissible, their Lordships have come to the conclusion that it is insufficient to prove with reasonable certainty that an absolute gift of this property was ever made by Madame *Voyer* to the Appellant. The witnesses who speak to the conversations do not profess to prove words of present gift. The utmost that can be contended

for is, that they give evidence of statements of Madame *Voyer*, which, it is said, amount to an acknowledgment that she had made it; but these statements are in themselves so vague, and the occasions on which they were made are so indistinctly described, that they cannot be safely relied on for proof of the gift, especially when they are not supported by the presumptions which arise from other facts appearing in the case.

In the first place, the manner of the deposit is opposed to the presumption that a gift of it was made at that time. The money was deposited in the name of Madame *Voyer*, and the account opened with her. It is not clear, from the Appellant's statements, at what subsequent time he asserts the gift to have been made; but he certainly means to allege it was before the first interest was received by him; if this be so, his offer to pay over that interest to Madame *Voyer* is unaccountable, and entirely opposed to his pretension that an absolute gift had before that time been made and accepted. It is said by him that he never accounted to Madame *Voyer* for the subsequent interest, but the manner of his accounting with her is not shewn. All that appears is, that on two occasions after the deposit, she declared herself satisfied with the administration of her affairs, and gave him formal discharges before a notary.

Again, it does not seem probable that the gift of a large sum of money should have been made to the Appellant in recompense, as it is said, of his services so soon after Madame *Voyer* had given him a valuable piece of land to reward him for them, or that, if it were intended, the Appellant, who knew the law, should be content to rely on the mere indorsement of the certificate as the sole proof of the new gift.

It could not be suggested that the motive of the gift was to assist the Appellant in his building operations, for the fact is beyond dispute that he borrowed money at 8 per cent. for this purpose, whilst this money remained on deposit at 4 per cent. only.

Further, he neither drew out the money, nor changed the account to his own name, nor gave notice to the bank of the transfer in Madame *Voyer's* lifetime. It is difficult to suppose that he was not aware of the importance of being able to point to some

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overt act to mark a change of possession, especially having regard to his double position of agent and donee; or that he would have neglected to take some step with that object if he had obtained an absolute and perfect gift of the money.

Their Lordships, whilst holding that the evidence fails to establish a valid gift, do not wish to exclude the supposition that something may have passed between Madame *Voyer* and the Appellant which led him to take a sanguine view of her intention to benefit him. But, be that as it may, it is obvious that in cases where formal authentication by notarial act is dispensed with, it would be dangerous for the Courts to support gifts except upon plain and conclusive evidence of the agreement; and it would be especially unsafe to do so where an agent sets up a gift from his principal, and mainly relies for proof of it upon the possession of a document which was, or at least may have been, originally entrusted to him for the purposes of his agency.

An objection has been raised to the maintenance of the action on the ground that all the heirs of Madame *Voyer* are not made parties to it; and it was pointed out that Madame *Richer* and Madame *Beaudry*, two of her daughters, have not been joined. The answer was that they had accepted the legacies given to them by Madame *Voyer's* will, and had therefore renounced all claims as heirs to her general estate. It was not denied that this would be so under Articles 712 and 713 of the Code, unless the legacies had been expressly given to them by preference and beyond their share. There is clearly no direct declaration to that effect in this will, but Mr. *Westlake* endeavoured to shew by the authority of some French decisions collected by *Merlin* in his work, *Questions du Droit*, that such a direction might be inferred from the words of the will under the circumstances of this succession. Their Lordships would be most reluctant to dismiss the suit for want of parties at this final stage, unless it was clearly demonstrated that they ought to do so. It is enough to say that they are far from being satisfied that the decisions referred to have the effect contended for, or that their authority can control the plain words of the *Code*. There is nothing in either of the three judgments of the Courts in *Canada* which lends any support to the objection; and if the point was really argued in those Courts, the learned

Judges must have considered either that there was no substance in the exception, or that it ought to have been taken *in limine* by a dilatory plea.

Their Lordships think it right to notice that it was stated, during the argument, by the Respondents' Counsel that the agents who instructed him had obtained from one of the Judges of the Court of Queen's Bench notes purporting to be the reasons for his judgment. The counsel for the Appellant loudly complained of this preference, and if the statement thus made be accurate, the complaint was justified. It was stated that the cause assigned for the notes not having been sent to the Registrar as required by the Rule of 1845, was that they had been destroyed in a fire. Whatever may be the case, whether the notes were recovered or rewritten, it is obvious that the omission to send them to the Registrar, and allowing one only of the parties to have them, was calculated to give to that party an undue advantage. From the notes actually sent over by the Court of Queen's Bench it would appear that the learned Judge referred to had merely expressed his concurrence in the reasons of Mr. Justice *Caron*. The Rule requires the reasons given by the Judges to be communicated to the Registrar, and the observations made by Lord *Kingsdown* in delivering the judgment of the Committee in *Brown* v. *Gugy* (1), shew that these reasons ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal. In the present case their Lordships felt constrained to refuse to look at notes so irregularly communicated.

In the result their Lordships think they ought to uphold the judgment of the Court of Queen's Bench, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Ashurst, Morris, & Co.*
Solicitor for the Respondent: *J. T. Simpson.*

(1) 2 Moore, P. C. Cases (N.S.) 365.

J. C.*
1874
March 20, 21.

GIOVANNI DAPUETO, of Genoa, in the Kingdom of Italy, Shipowner, the Owner of the Barque or Vessel "PIEVE SUPERIORE" . . . . . } Appellant;

AND

Messrs. JAMES WYLLIE & Co., of No. 13, Leadenhall Street, in the City of London, Merchants, and Messrs. O. TYNE & Co., of Bremen, Merchants . . . . } Respondents.

THE "PIEVE SUPERIORE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

Admiralty Court Act, 1861, *s.* 6—*Liability of Ship for Breach of Contract where Goods carried into English port.*

Where a Petition on Protest is filed on the ground of want of jurisdiction, before the Plaintiff's petition setting forth the particulars of his damage, the Petition on Protest ought to state the facts which shew want of jurisdiction.

The general words of clause 6 of the *Admiralty Court Act*, 1861, "any claim . . . for any breach of contract on the part of the owner, &c., of the ship" have relation to the contract in the bill of lading.

Where the parties contemplated that the goods would, or at least might, be carried into and delivered in an English port, and it was so provided by the bill of lading signed by the master at *Rangoon*, in pursuance of a charter-party made in *England*, and the master in fact put into an English port for orders in part fulfilment of the contract of carriage; the jurisdiction, at least in respect of then existing causes of suit, arose when the goods were so carried into port, and was not taken away by the ship being subsequently sent to a foreign port to be discharged.

The 6th section of the *Admiralty Court Act*, 1861, does not confer a maritime lien. It only gives to the Court of Admiralty jurisdiction to entertain a suit either *in personam* or *in rem* by arrest of the ship whenever it comes within reach of process. The arrest can not avail against any valid charge on the ship, nor against a *bonâ fide* purchaser.

The *Admiralty Courts Act*, 1861, being intended to remedy a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow.

THIS was an appeal from the Court of Admiralty, rejecting the admission of a Petition on Protest to the jurisdiction of the Court filed by the Appellant.

* *Present*:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

The Appellant was the owner of an Italian barque, called the *Pieve Superiore*. The *Pieve Superiore* having been arrested by the Respondents, the Appellant appeared under protest to the jurisdiction of the Court, and filed the Petition in question, setting out the grounds on which he submitted that the High Court of Admiralty had no jurisdiction in the suit.

The Petition stated in effect, that pursuant to charterparty, dated *London*, the 30th of March, 1872, and *Genoa*, the 6th of April, 1872, between the Defendant and *Ferdinand Schiller*, for self and partners of Messrs. *Borradaile, Schiller, & Co.*, of *Calcutta*, the said ship proceeded to *Rangoon*, and there loaded a cargo of rice in bags, for which the master of the said vessel signed and delivered a bill of lading, the material parts of which were as follows:

'Shipped in good order and well conditioned, by *Gladstone, Wyllie, & Co.*, in and upon the good ship or vessel called the *Pieve Superiore*, whereof is master for this present voyage, *Consigliere*, and now riding at anchor in the *Rangoon* River, and bound for *Belle Isle, Scilly, Queenstown*, or *Falmouth*, for orders to discharge at a port in the *United Kingdom*, or on the Continent between *Havre* and *Hamburg*, both inclusive, 5000 bags rice, each 210 lbs. net, 5300 bags, each 198 lbs. net, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of , as ordered (all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted), unto order or to its assigns, he or they paying freight for the said goods at the rate of, &c.'

The vessel sailed with the cargo from *Rangoon*, and her master, in the exercise of his option, proceeded therewith to the port of *Falmouth* for orders, and there received orders from the Plaintiffs or their agents to proceed with the said cargo to *Bremen*, and to discharge the said cargo at *Bremen*, which the master accordingly did. The vessel afterwards left *Bremen* on a new voyage for *Cardiff*, where she arrived, and where she was arrested by the Plaintiffs. The Plaintiffs alleged themselves to be assignees for valuable consideration of the bill of lading, and alleged that the cargo of rice suffered damage in the vessel, and that they had in-

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stituted the suit as such assignees for the recovery of losses which they alleged themselves to have sustained by negligence or misconduct, or by breach of duty or breach of contract on the part of the master or crew of the vessel.

The Defendant submitted that the said cargo of rice was not carried into any port in *England* or *Wales* within the true intent and meaning of the 6th section of the *Admiralty Court Act*, 1861, and prayed the Judge to pronounce against the jurisdiction of the Court, and to dismiss the suit with damages and costs.

The 6th section of the *Admiralty Court Act*, 1861, is as follows: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in *England* or *Wales* in any ship, for damage done to the goods or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in *England* or *Wales*; provided, &c."

The Respondent having moved for the rejection of the Petition, the Judge of the Admiralty Court made an order rejecting the admission of the petition with costs, and ordering the Appellant to enter an absolute appearance in the cause, but he gave leave to the Appellant to appeal.

From this order an appeal was brought to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*, for the Appellant:—

This foreign ship has been arrested, but did nothing to bring itself within the jurisdiction of the Court of Admiralty. It merely called at *Falmouth* for orders, which it might have got without going into port. The Act did not intend to give jurisdiction where the ship merely calls with goods in her, but does not bring in the goods as goods, for the purpose of doing something to them, and at a place where they are deliverable, or become deliverable or disposable. If there is jurisdiction because she has merely called,

(1) Lee 162 62-E. 170

and if it can be enforced ever after, even when the ship's company is dispersed and their evidence no longer available, it would be very difficult to do justice under such a law. The Legislature is not likely to have intended to attach any such liability to a foreign ship for merely calling. This is different from the case where the Master has brought the goods to *England* and refuses to carry them farther. It is not said where the breach of contract was committed; we are entitled to assume that it was not in *England*. In the case of *The Bahia* (1) the Master had clearly carried the goods in; he had put into *Ramsgate* and landed the cargo, but refused to deliver it. We do not say that delivery is necessary to give jurisdiction, but the goods must have been brought in. In the case of *The Patria* (2), a foreign ship remained three months at *Falmouth*. The shipper was entitled to his goods, and they were in this country in pursuance of their original destination. Until the terminus is designated, it is no part of the contract to deliver at that terminus; the generality of the words "carried into" must be limited in some way; the carrying in must be with intention to deliver. As to the remark in the judgment of the Court below, that there is jurisdiction by reason of the ship having previously called in *England*, Courts are not to act in consequence of some wrong done after the ship has left *England*. The charter-party was executed at *Genoa*, the shippers were at *Calcutta;* the ship would not have been liable if it had changed hands. No time is assigned for the supposed wrong. The carrying in cannot apply to entering a mere roadstead, as might happen at *Plymouth;* it must mean carrying into a real port where goods are to be dealt with as if they were imported goods, in fact, to the terminus of the goods. *The Teutonia* (3) went into port to avoid the French; here they went in for orders, the ship having the goods aboard was a mere accident; they might have stayed outside and sent in for orders.

Upon the construction contended for by the Respondents, if a steamer has a right to stop and coal at an English port, as the *Bremen* and *New York* steamers call at *Southampton*, then the goods

(1) Bro. & Lush. 61. (2) Law Rep. 3 A. & E. 436, 459.
(3) Law Rep. 4 P. C. 171.

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on board of her are carried in; and she would fall within sect. 6, whereas the proper jurisdiction over her would be at her terminus. Goods which are still on board are as if in foreign territory, the ship being here only for a limited purpose. A general ship may take in her cargo at different ports, and while doing so, or calling to coal, she might be arrested before she had performed the substantial part of her voyage, and so the goods of shippers would be interfered with, for damage, perhaps, to a few goods. The English Legislature could not have intended to enact such a law for the ships of other nations.

Mr. *C. Butt*, Q.C., Mr. *Cohen*, Q.C., with whom was Mr. *Gainsford Bruce*, for the Respondents:—

The jurisdiction is given only where there is no owner domiciled in *England* and *Wales*. The case of *The Two Ellens* (1) shews that it does not create a maritime lien. There is nothing against international law in the *Admiralty Act*, s. 6; an English ship may, under the general maritime law, be arrested abroad, and Dr. *Lushington* states the liability of foreign vessels under sect. 6, without the limitation which has been suggested, to the place where the ship delivers cargo. We allow that it is not a carrying in if the master deviates from his voyage for his own purposes, or is driven by stress of weather. It does not appear that the terms of the Act are to be set aside where the ship merely calls for orders. In the case of grain, though not of every kind of cargo, the goods are examined by brokers, who report to *London*, and upon their report purchases are made by the merchants; therefore ships must call at ports, where it is usual to examine the cargo. A ship from abroad is seldom a general ship, but commonly one person charters the whole: *Ireland* v. *Livingstone* (2). It is admitted that where a ship is to call for orders, the whole ship is not chartered. In *The Ironsides* (3), Dr. *Lushington* explains the 6th section of the Act. In *The Bahia* (4), he says that the words "carry into" were designedly used instead of "import;" and this passage, which, being of the date 1863, may almost be called a

(1) Law Rep. 4 P. C. 169.
(2) Law Rep. 5 H. L. 410.
(3) Lush. 458.
(4) Bro. & Lush. p. 62.

contemporaneous exposition of the statute, is cited by the present Judge of the Admiralty in the case of *The Patria* (1). It is admitted that if goods are bonded by the act of the master, that might render the ship subject to the jurisdiction. In the case of *The Patria* (2) the captain went in for one reason, he remained for another reason; he never made *Falmouth* the terminus of his voyage, and stood out for wages under the German law during detention. In the case of *The Teutonia* (3) Lord Justice *Mellish* adverted to the 6th section of the *Admiralty Act* as the foundation of the Court's jurisdiction. There is nothing in sect. 6 to prescribe that the cargo shall be discharged, or brought to the port of destination. The ordinary words of a bill of lading speak of carriage and delivery as two different things. It is said that the damage may, for anything that appears, have taken place between *Falmouth* and *Bremen*; but if any one knows the fact it is the shipowner, and he ought to have shewn it; but he does not even allege that the fact was so. The person objecting to the jurisdiction is bound to make out his objection. The Plaintiffs are not foreigners. It would be injustice if it were possible for a ship to go away without liability after injuring or throwing away the cargo, before the consignee has a right to demand possession of it. As to the argument from inconvenience, a demand such as ours must be answered in the Courts of some country, and why not in the English Courts? The literal meaning of the words favours our contention.

Dr. *Lushington*'s observations in *The Ironsides* (4) shew that the intention was to revive the old jurisdiction of the Admiralty, which it had lost, and to put it on the same footing with foreign Courts.

In the case of *The Bahia* (5) the goods were, no doubt, landed, but the decision would have been equally good if they had been kept on board.

The Legislature sought to apply a remedy where the persons liable do not reside here. In this it has not gone beyond what the law does in attaching the goods of non-residents in *London* and elsewhere to found jurisdiction.

Mr. *Milward*, Q.C., in reply.

(1) Law Rep. 3 A. & E. 436, 459.
(2) Ibid. 436.
(3) Law Rep. 4 P. C. 171.
(4) Lush. 458.
(5) Bro. & Lush. 61.

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1874. May 21. Their Lordships reserved their judgment, which was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from an order of the Judge of the High Court of Admiralty, rejecting a Petition on Protest to the jurisdiction of the Court, in a cause *in rem* instituted against the ship *Pieve Superiore*, for damage to cargo under the 6th section of the *Admiralty Court Act*, 1861.

The facts alleged in the Petition on Protest are: that the Appellant, the owner of the ship, lived in *Genoa;* and that, on the 30th March, 1872, a charterparty was made in *London* between him and Mr. *Schiller*, on behalf of the house of *Borradaile, Schiller, & Co.*, merchants of *Calcutta*, by which it was agreed the ship should proceed to one of certain named ports in *India*, and there load a cargo of rice in bags, for which the master was to deliver bills of lading. The ship accordingly went to *Rangoon*, and was there loaded by Messrs. *Gladstone, Wyllie, & Co.*, with a cargo of rice; and in pursuance of the charter, the master signed bills of lading, describing the ship to be "bound for *Belle Isle, Scilly, Queenstown*, or *Falmouth*, for orders to discharge at a port in the *United Kingdom*, or on the Continent between *Havre* and *Hamburg*," and making the cargo deliverable to order, or assigns, on payment of freight at the rate of £3 15*s.* sterling per ton. It is further alleged that the ship went into the port of *Falmouth*, with her cargo, for orders; and whilst lying in that port, the master received orders to go to *Bremen* to discharge; that she went there and discharged her cargo, and afterwards sailed to *Cardiff* on a new voyage, and was arrested in that port in the present suit.

The concluding paragraphs of the Petition are the following:—

"The Plaintiffs allege themselves to be assignees, for valuable consideration, of the said bill of lading; and allege that the said cargo of rice suffered damage in the said vessel; and they have instituted this suit as such assignees for the recovery of losses which they allege themselves to have sustained by negligence or misconduct, or by breach of duty, or breach of contract, on the part of the master or crew of the said vessel.

"Save as aforesaid, the said cargo of rice was never brought into any port in *England* or *Wales*.

"The Defendants submit that the said cargo of rice was not carried into any port in *England* or *Wales* within the true intent and meaning of the 6th section of the *Admiralty Court Act*, 1861; and that by reason thereof this Honourable Court has not jurisdiction to entertain this suit."

The Petition on Protest being filed before the Plaintiff's Petition setting forth the particulars of his damage, ought to state the facts which shew want of jurisdiction. But this Petition does not allege whether the misconduct or breaches of contract complained of arose before or after the ship left the port of *Falmouth*. It is consistent with it that the causes of complaint, or some of them, arose before she left that port; and their Lordships think it must be assumed that this may have been so in dealing with the question raised by the protest. The only objection taken to the jurisdiction is "that the said cargo of rice was not carried into any port in *England* or *Wales* within the true intent and meaning of the 6th section of *The Admiralty Court Act*, 1861."

The section is as follows:—"The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee, or assignee, of any bill of lading of any goods carried into any port in *England* or *Wales* in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in *England* or *Wales*."

Their Lordships are satisfied that this enactment does not confer a maritime lien, for the reasons given in the judgment of this Committee upon the effect of the previous clause of the Act (the 5th) in the case of *The Two Ellens* (1). The clause in question does no more than give to the Court of Admiralty jurisdiction to entertain suits in cases that can be brought within its scope, and which, it is to be observed, may be instituted *in personam* as well as *in rem*.

(1) Law Rep. 4 P. C. 169.

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The clause is undoubtedly framed in large and general terms, and Dr. *Lushington*, a Judge of high authority, in a judgment delivered soon after the passing of the Act, thought it was intentionally so framed: *The Bahia* (1).

It was insisted for the Appellant, and not denied by the Respondent's counsel, that the words "carried into any port" must receive some limitation, otherwise, it was said, if a ship with cargo on board, being under no obligation to enter an English port, was driven to take refuge in such a port by stress of weather or other accident, the jurisdiction would be founded. The learned counsel for the Appellant, however, felt great difficulty in defining what the limitation should be, but ultimately contended that to bring a claim within the clause, the goods must be carried into a port in *England* or *Wales*, for the purpose of delivery, or in which, from circumstances, they become deliverable. The latter branch was introduced with reference to some decisions which had upheld the jurisdiction, notwithstanding that the entry into an English port was not contemplated by the contract. But supposing the suggested definition to be correct so far as it goes, their Lordships are not prepared to hold that it contains an exhaustive interpretation of the clause.

Cases must frequently arise at ports of call and intermediate ports, giving occasion for the remedy it was intended to afford to English merchants against foreign shipowners, by proceedings in the English Court of Admiralty. Besides the instances where causes of action have arisen before the arrival of the ship at such ports, take the cases of damage done to goods, or of unjustifiable delay, in the port of call itself; or the case of a ship bound, without calling for orders, to go direct to *London* to discharge her cargo, and the master improperly putting into some other English port, and refusing to take the cargo on. Instances of this kind would certainly be within the scope of the mischief intended to be dealt with; and their Lordships are reluctant in construing the Act so to interpret words, large enough in their ordinary meaning to embrace such cases, as to exclude them from its operation, and thus leave foreign masters who may have broken their contracts free to take away their ships from this country in the sight of

(1) Br. & Lush. 61.

English consignees, who would be powerless, as they were before the Act, to stop them.

The Legislature has used the words "carried into any port in *England* or *Wales*," and may have done so designedly to meet cases of the kind to which reference has just been made. It has said nothing of delivery, nor of the purpose for which the goods may be carried into port. The general words of the clause "any claim . . . . for any breach of contract on the part of the owner, &c., of the ship" must undoubtedly be construed to have relation to the contract in the bill of lading: and it may have been the intention of the Legislature to give the jurisdiction only in the case of claims arising on contracts to carry the cargo to some port in *England* or *Wales*. It is not, however, necessary to consider whether the operation of the Act ought to be limited to this extent, for if it were there would not be an absence of jurisdiction in the present suit. In this case the parties contemplated that the goods would, or at least might, be carried into and delivered in an English port, and the bill of lading signed by the master at *Rangoon*, in pursuance of a charterparty made in *London*, so provided. The master in fact put into the port of *Falmouth* for orders in part fulfilment of the contract of carriage, and might, in further fulfilment of it, have been ordered to discharge there, or at some other English port. Their Lordships think that under these circumstances the jurisdiction, at least in respect of then existing causes of suit, arose when the goods were so carried into the port of *Falmouth*, and was not taken away when the ship was subsequently ordered to a foreign port to be discharged.

If the jurisdiction of the Court of Admiralty over the claim once attached, that Court, in their Lordships' opinion, would be competent at any subsequent time to entertain a suit either *in personam* or *in rem* by arrest of the ship whenever it came within reach of its process. They therefore think, assuming the jurisdiction to have once attached, that it was competent to arrest the ship in this suit on her arrival upon a new voyage at *Cardiff*. The arrest, however, there being no maritime lien, could not avail against any valid charges on the ship, nor against a *bonâ fide* purchaser; for, as already stated, the object of the statute is only to found a jurisdiction against the owner who is liable for the damage,

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and to give the security of the ship, the *res*, from the time of the arrest. This is clearly explained by Dr. *Lushington* in *The Alexander Larsen* (1), and *The Pacific* (2), and by this Committee in *The Two Ellens* (3).

The statute being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. And the decisions upon it have hitherto proceeded upon this principle of interpretation.

One of the earliest decisions (*The Bahia*) (4) gives the widest interpretation to the word "carried." In that case the cargo was consigned to *Dunkirk*. The ship, in consequence of an accident, put into the port of *Ramsgate*, and the master refused to carry on the cargo to *Dunkirk* or to give delivery at *Ramsgate*. It was there contended by the Defendant's counsel, but without success, that the words "carried into any port in *England*," meant so carried under a contract to that effect. In upholding the jurisdiction of the English Court of Admiralty, Dr. *Lushington*, after stating the facts, said:—"That this is a great grievance cannot be denied, and the Court ought to give, if necessary, great latitude to the construction of the Act of Parliament, in order to extend the remedy to this case. However, it appears to me that the section was carefully worded to give the utmost jurisdiction in the matter. It uses the words 'carried into any port in *England* or *Wales*,' and does not use the word 'imported.' I apprehend the phrase 'carried into' was advisedly used instead of the word 'import.'" It does not appear that this decision was appealed from.

The present Judge of the Court of Admiralty, Sir *R. Phillimore*, adopted the view of Dr. *Lushington* in deciding the case of *The Patria* (5). There, a German ship bound under a bill of lading to take a cargo of coffee to *Hamburg*, put into *Falmouth* shortly after the commencement of the French and German war—*Hamburg* was then blockaded. On the removal of the blockade the master refused to go on to *Hamburg*, or to deliver the cargo at

(1) 1 W. Rob. 288–294.
(2) Br. & Lush. 243.
(3) Law Rep. 4 C. P. 169.
(4) Br. & Lush. 61.
(5) Law Rep. 3 A. & E. 459.

Falmouth, and Sir *R. Phillimore* sustained the jurisdiction of the Court over claims arising on these breaches of contract; and again there was no appeal.

There was recently another important cause in the Court of Admiralty, also arising out of the war between *Germany* and *France*, which came before this tribunal on appeal (*The Teutonia*) (1). In that case, the *Teutonia*, a German vessel, called at *Falmouth*, one of the ports of call under the bill of lading, for orders, and was ordered to *Dunkirk* to discharge. On nearing the French port she found that war was imminent, and put back to *Dover*. She was again directed to go to *Dunkirk*, but the master refused to go there, or to deliver the cargo at *Dover* without payment of freight. For this refusal a suit was brought against the ship in the English Court of Admiralty under the clause in question. It failed on the merits, but the previous decisions were, apparently, acquiesced in, for no objection was taken to the jurisdiction.

In the cases of *The Bahia* (2) and *The Patria* (3), the arrival at an English port was not contemplated by the contract, and the ships put into our ports by reason only of circumstances extrinsic to it, nor did they then enter them for the purpose of discharging their cargoes, which only in any sense became deliverable there by reason of the subsequent refusal of the master to take them on to the port of destination. Their Lordships, in pointing out the distinction between these cases and the present, must not be understood to question their authority. They are fully sensible of the difficulty of construing this loosely drawn clause, and giving a satisfactory interpretation of it. It is sufficient for them to decide that under the circumstances of this case, to which they have above adverted, the objection taken *in limine* to the jurisdiction is not, upon the facts disclosed in the protest, sustained.

For these reasons their Lordships think the order of the Judge of the High Court of Admiralty is right, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

Solicitor for the Appellant: *Thomas Cooper.*
Solicitors for the Respondents: *Pritchard & Sons.*

(1) Law Rep. 4 P. C. 172. (2) Bro. & Lush. 61.
(3) Law Rep. 3 A. & E. 459.

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TANCRÈDE SAUVAGEAU (ASSIGNEE DULY APPOINTED TO THE INSOLVENT ESTATE OF LOUIS ADÉLARD SÉNÉCAL) . . . } APPELLANT;

AND

LOUIS GAUTHIER . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA (APPEAL SIDE).

Rules of Appeal for Lower Canada—Redemption of Rent—Instalments.

Under the *Code of Civil Procedure for Lower Canada* the appealable amount is £500 sterling, but an appeal is also permitted in cases of less value if they be "cases concerning titles to lands or tenements, annual rents, or other matters in which the rights in future of parties may be affected."

An annual rent of $11. 28c. had been sold for $456, payable in ten equal yearly instalments, and the land was hypothecated to secure the amount.

In a suit to enforce payment of certain instalments, the Court of Queen's Bench in *Lower Canada* granted leave to appeal to Her Majesty in Council:—

Held, that the case did not fall within the above description, and was not appealable.

Where leave to appeal has been unduly given the proper course is to come before the Privy Council before any expense has been incurred, and to apply for the dismissal of the appeal.

Such an application if delayed till the hearing will only be granted without costs, and if there be special circumstances in favour of granting special leave to appeal, an application for such leave will be entertained, but if it is granted fresh security for costs must be given.

THIS was an appeal from a judgment of the Court of Queen's Bench for the Province of *Quebec, Canada*, rejecting a petition, presented by the Appellant, for leave to intervene in an action brought by the Respondent against one *Charles Martel*.

In the year 1866, one *Louis Adélard Sénécal* was entitled to a quit-rent of $\$11\frac{28}{100}$, arising out of land in the township of *Upton*, belonging to *Charles Martel*, together with considerable arrears of the quit-rent then due, and by a deed, dated the 26th of February, 1866, he agreed to release to *Martel* the quit-rent and all arrears on payment by him of the sum of $456 in ten equal yearly instal-

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

ments of $45\frac{60}{100}$, and *Martel* hypothecated the land as security for these payments, and as further security it was provided that the rights of *Sénécal* to the quit-rent and arrears, and to resume possession of the land in case of non-payment, should not cease till the instalments were fully paid.

On the 10th of August, 1866, *Sénécal*, being then solvent, but desirous of obtaining accommodation from the Respondent *Gauthier*, to render him secure in respect of the moneys he should advance conveyed to him by an authenticated deed, executed before notaries, a large number of debts then due or about to become due to him, amounting in the whole to more than $20,000, and, *inter alia*, the debt of $456 due from *Charles Martel*, of which no part had then been paid, and *Sénécal* subrogated the Respondent in all his rights, privileges, and hypothecations, and it was provided by the said deed that the Respondent should receive the said debts and employ them as he pleased, accounting for the same to *Sénécal*.

On the 2nd of November, 1867, *Sénécal* became insolvent, being, as it was alleged, largely indebted to the Respondent for advances made to him under the deed of the 10th of August, 1866. On the 14th of November, 1867, the deed of assignment was registered.

On the 16th of November, 1867, the Respondent gave notice of the deed to *Martel*.

On the 20th of November, 1867, *Sénécal* executed a deed of assignment of all his goods, in accordance with the *Canadian Insolvency Act*, 1864, to the Appellant, being the official assignee duly appointed under the said Act.

The Respondent on the 18th of March, 1869, sued *Martel* in the Circuit Court of *Arthabaska* for $147. 75*c*., being principal and interest in respect of three years' arrears under the said deeds of the 26th of February, 1866, and the 10th of August, 1866. *Martel* pleaded (*inter alia*) in substance that the rights of the said *Louis Adélard Sénécal*, under the said deeds, had vested in the Appellant by virtue of the assignment to him as official assignee as aforesaid. On the 8th of October, 1869, the Appellant presented his petition for leave to intervene in the said action, and with the consent of all parties the proceedings in the principal action were stayed to abide the event of such intervention.

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The Appellant alleged that on the 16th of November, 1867, when notice of the deed of the 10th of August, 1866, was given to *Martel, Sénécal* was insolvent; and that, as it was given within thirty days of the date of the assignment to the official assignee, it was null and void as against him. The Respondent pleaded a number of pleas which raised the defence that the deed of the 10th of August, 1866, being made more than thirty days before the deed of assignment to the official assignee, the fact that the notice to *Martel* was within the said period of thirty days was immaterial; and that under the *Insolvency Act* of 1864 notice to *Martel* was unnecessary; and further that the Appellant could not take the proceedings in question after the lapse of more than a year from the date of the assignment to him.

The Circuit Court decided the questions raised in favour of the Appellant. The Respondent *Gauthier* thereupon appealed to the Court of Queen's Bench for the Province of *Quebec*, which reversed the judgment of the Court below, and dismissed the intervention of *Sauvageau* (the present Appellant), and declared good and valid the deed of transfer of the 10th of August, 1866, as well as the act of signification of the said transfer of the 16th day of November, 1870, on which was based the action of the said *Louis Gauthier*, and condemned the Appellant, in his character of official assignee, in the costs both in the Court below and in that Court.

The Appellant subsequently obtained from the Court of Queen's Bench leave to appeal from the said decree and judgment of that Court to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Wills*, Q.C., and Mr. *F. C. J. Millar*, appeared for the Appellant.

Mr. *Benjamin*, Q.C., and Mr. *H. M. Bompas*, for the Respondent.

The counsel for the Respondent took a preliminary objection to the hearing of the appeal, on the ground that the matter in dispute in the appeal was below the appealable value of £500, and did not fall within either of the exceptional sections which authorize the admission of an appeal in cases of less value. The first of the sections relates to matters concerning the public revenue, the

second to cases concerning the title to lands or tenements, annual rents, or other matters whereby the rights of parties in future may be affected.

The counsel for the Appellant complained that the objection had not been taken earlier by appealing against the order of the Court of Queen's Bench, who granted leave to appeal. They urged that the subject matter fell within the terms of sect. 2, because the deed of the 26th of February, providing for the annual payment of a stipulated sum, was a transaction by which the rights in future might be bound; that the hypothecation of the land to secure the payments, gave to *Sénécal* a right in the land, and that the old rent was not to be extinguished until the payments were completed; they urged also that the decision of this case would govern the decision of several questions under the deed of the 10th of August, 1866, which involved property greatly above the appealable amount, and affected the whole administration of the insolvent estate.

The judgment of their Lordships was pronounced by

SIR JAMES W. COLVILE:—

It is desirable to state shortly how this question arises. It appears that *Martel* was indebted to the insolvent *Sénécal* in a certain sum of money, for which a rent-charge had been commuted. That sum of money was payable by instalments, and it was also secured by hypothecation upon the land upon which the rent had originally been charged. The insolvent a considerable time before his insolvency, assigned this, with other choses in action, to *Louis Gauthier*, the Respondent, for value; but notice of the assignment was not given to *Martel* until *Sénécal* was in insolvent circumstances. *Louis Gauthier* sued *Martel*, the original debtor, for certain instalments of that sum; the whole value of the particular debt so assigned being considerably below the appealable amount of £500. In that state of things the Appellant, who was the general assignee of the insolvent estate of *Sénécal*, intervened, and there remained no question as to the liability of the original debtor; but the simple question tried in the suit, and which is now brought before their Lordships on appeal, was whether the

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particular assignee could claim the sum sued for, or whether it had passed by the general assignment of the insolvent's effects to his general assignee. The solution of that question, of course, depended upon the further question, whether "signification" or notice was necessary to complete the title of the particular assignee, and whether that notice had been given in proper time.

A preliminary objection is now taken to the hearing of this appeal on the ground that it was not competent to the judges of the Court of Queen's Bench in *Canada* to allow such an appeal; and in support of that contention we are referred to Article 1178 of the *Canadian Code of Procedure*, which limits the cases in which an appeal lies as of right to Her Majesty in Council from final judgments rendered in appeal or error by the Court of Queen's Bench. That article provides that such an appeal will lie, first, "where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to Her Majesty;" secondly, "in cases concerning titles to lands or tenements, annual rents, or other matters in which the rights in future of parties may be affected;" thirdly, "in all other cases wherein the matter in dispute exceeds the sum or value of £500 sterling." It is clear that the case falls neither within the first nor the third of these clauses. The only clause within which it is sought to bring it is the second. But their Lordships are of opinion that it does not really fall even within that clause. It has been argued, that, inasmuch as the particular debt which was in question in this suit was payable by instalments, the title to it was a matter in which the rights in future of the parties might be affected. But their Lordships do not think that that is the true construction of the clause. The matter in question was the whole debt; and their Lordships think that the mere circumstance of the debt being payable by instalments would not make the case appealable to Her Majesty in Council if it were not otherwise appealable. It was further suggested the same question might arise in respect of the other assets comprised in the assignment to *Gauthier*, and that the decision in this case would govern the rights of the parties as to all those assets. But their Lordships have not the means of knowing whether the title to those other choses in action would stand upon precisely the same ground as the title to that in question in this

suit. Some of them may have been realised, and as to some of them notice may have been given long before the insolvency. Their Lordships cannot assume that the facts touching these other debts were before the Judges in *Canada;* and, even if they were, their Lordships, considering the mode in which this litigation arose, viz., by the intervention of the general assignee in a suit brought by the particular assignee to realise a small sum as against one of those debtors, and not in a suit brought by the general assignee to impeach the whole transaction, are not satisfied that it was a case in which the Court of Queen's Bench would have had jurisdiction to allow the appeal. The power of the Court of Queen's Bench to allow an appeal is clearly limited by the *Code;* it has no power, upon special grounds not provided for by the *Code,* to grant special leave to appeal.

The question, therefore, is, what ought now to be done? Now their Lordships are of opinion that this case very much resembles the case of *Retemeyer* v. *Obermuller* (1), decided as early as 1837, in which it appeared that the appeal had been irregularly allowed in the colony, the security not having been completed within the proper time. In that case, Lord *Brougham,* having stated that the irregularity was fatal to the appeal as it stood, said this: "The Respondent has, however, appeared to the appeal here, and lodged his case. It is clear, therefore, that the Appellant must have been led to suppose that any objection on the score of irregularity was waived; and though their Lordships are of opinion that the order made by the Court below, allowing the appeal, was, for want of the security being completed, irregular, and could not be cured by any waiver or implied consent on the part of the Respondent, yet they think it would be a fit case to recommend the allowance of the appeal upon a petition presented for that purpose. The result will be that the case must stand over for such application." In that case it was held that the irregularity was fatal to the appeal as it stood; and the Committee, though it thought that there might be ground for allowing a special appeal, directed the case to stand over in order that there should be an application for special leave to appeal. It also pointed out that the Respondent, in allowing the case to be

(1) 2 Moore's P. C. Cases, 93.

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lodged, might have induced the Appellant to suppose that the objection on the score of irregularity was waived. And upon this last point their Lordships cannot but observe that the proper course, when such a question as this arises, is to come here by petition as early as possible, and before the cases are lodged, and the expense of preparing those cases is incurred, in order to bring the point before their Lordships, and to get the appeal dismissed. It is then open to their Lordships to recommend Her Majesty either to dismiss the appeal, in which case the parties are not put to the expense of preparing for the hearing; or to grant special leave to appeal. Their Lordships, if they were to dismiss this appeal upon the objection now taken for the first time, would be disposed to dismiss it without subjecting the Appellant to the costs, which have been so unnecessarily incurred. On the other hand, they are not prepared to say that if a petition had been presented to them for special leave to appeal, there may not be circumstances in this case which would have induced them to recommend Her Majesty to grant such leave to appeal. They by no means invite such an application, but leave it for the consideration of the Appellant whether he would prefer to have the appeal now dismissed without costs, or whether he would wish the case to stand over in order that he may present a petition for special leave to appeal upon such grounds as he thinks might induce their Lordships to recommend Her Majesty to give that leave.

It is also to be considered, that in those cases in which an appeal having been irregularly allowed in the colony, special leave to appeal has been granted here, their Lordships have always required fresh security for costs to be given.

Eventually it was directed that the appeal should be dismissed without costs, unless a petition for special leave was lodged before the 15th of June.

Solicitors for the Appellants: *Ashurst, Morris, & Co.*
Solicitors for the Respondent: *Bischoff, Bompas, & Bompas.*

THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA . . . . . } APPELLANTS;

AND

CHARLES PATON HENDERSON AND COLIN GEORGE ROSS, TRADING UNDER THE STYLE OR FIRM OF C. P. HENDERSON & CO. . . } RESPONDENTS.

J. C.*
1874
May 5.

ON APPEAL BEFORE THE SUPREME COURT OF HONG KONG.

Bill of Lading—Secret Trust—Assignment without Notice—Consideration.

A., a merchant in *London* and in *Hong Kong*, purchased goods for shipment from *B.*, and paid for them by his acceptance of *B.'s* draft against the shipment, on the terms that *A.* should send them to his firm at *Hong Kong*, and that the proceeds should be remitted to *A.* in bills specially to meet such acceptance.

A.'s firm at *Hong Kong* owed a large sum to *C.*, and were under engagement to secure the debt by depositing shipping documents with him. Being threatened by *C.* with immediate legal proceedings, they promised him that if he would forbear to take such proceedings, and would release them from their obligation to deposit shipping documents, they would deposit with him a bill of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the value thereof. The bill of lading of the goods purchased from *B.* was accordingly indorsed to *C.*, who had no knowledge of the terms made with *B.*, and it was returned by *C.* according to agreement, on receipt of an equivalent sum:—

Held (reversing the judgment of the Supreme Court of *Hong Kong*), that *C.* by such forbearance and release gave valuable consideration; that the legal interest in the goods passed by the indorsement of the bill of lading, and that *B.* could not enforce his claim against the proceeds of sale received by *C.* in respect thereof.

THIS was an appeal from a decree of the Supreme Court of *Hong Kong*, declaring that the Respondents were entitled to have the proceeds of the sale by the Appellants of certain goods, called long ells, paid to them to the extent in the decree set forth.

The Respondents were merchants in *Manchester*, under the firm of *C. P. Henderson & Co.* The Appellants were a banking corporation, having a place of business at *Hong Kong*.

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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Certain persons, named *George Lyall, Charles Frederick Still,* and *George Francis Maclean,* carried on business in co-partnership in *London,* under the firm of *George Lyall* and *C. F. Still,* and in *Hong Kong* and in *Japan* under the firm of *Lyall, Still, & Co.*

In the month of August, 1866, the *London* firm of *George Lyall* and *C. F. Still* and the Respondents commenced doing business together on certain terms agreed upon between them, the most material parts of which are stated as follows, in a letter addressed by the Respondents to *George Lyall* and *C. F. Still,* on the 1st of September, 1866:—

"Dear Sirs,—We shall be very happy to purchase goods for your account for shipment to your firms in *China* or *Japan,* drawing upon you either at nine months' date, or at six months renewable at three months, for the invoice value.

"Our usual mode of conducting such transactions is as follows:—We ship the goods by such vessel as you shall name to the consignment of your house abroad, we handing you the bills of lading and invoices in triplicate, both for transmission to your foreign house.

"The invoices will state that the proceeds of the shipments are to be remitted to you in first-class bank bills, specially to meet your acceptance of our draft or any renewal thereof against the shipment. Your house abroad to advise us of the remittances."

On the 24th of October, 1866, the Respondents wrote to the firm of *Lyall, Still, & Co.,* in *Hong Kong,* as follows:—

"With reference to the goods which we have purchased and shipped to you on account of Messrs. *George Lyall & C. F. Still,* of *London,* upon whom we have drawn for cost of same at nine months' date, we wish to point out to you that in the headings of our invoices for those shipments it is stated that the proceeds are to be remitted by you to Messrs. *George Lyall & C. F. Still,* specially to meet their acceptances of our drafts (or any renewal thereof) against the shipments: we have arranged with Messrs. *George Lyall & C. F. Still* to continue in future to invoice all purchases on their account in the same manner; and we shall feel obliged if, in acknowledging the receipt of this letter, you will hand us your undertaking to make the remittances in accordance with the terms

of the invoices. Messrs. *George Lyall & C. F. Still* have also further agreed that the remittances are always to come forward in first-class bank bills. We shall also be glad if, upon all occasions when you send remittances to Messrs. *George Lyall & C. F. Still* against the shipments, you will hand us a press copy of the letter which you write to those gentlemen, enclosing the remittances.

"We annex the form of letter which we shall be glad if you will adopt in making all remittances to Messrs. *George Lyall & C. F. Still* against shipments on their account. We hand the invoices and bills of lading to Messrs. *George Lyall & C. F. Still,* with whom we have an undertaking that they will transmit the same to you. We are," &c.

Form of letter referred to.

"*Hong Kong.*

"Messrs. *George Lyall & C. F. Still, London.*

"Dear Sirs,—We beg to wait upon you with the undermentioned remittance, which please place to the credit of shipment outwards per " " marked on account of yourselves, and specially to meet your acceptance of Messrs. *C. P. Henderson & Co.'s* draft (or any renewal thereof) against said shipment.

"Yours faithfully."

In answer thereto, the said *Hong Kong* firm wrote as follows:—

"*Hong Kong,* 15th December, 1866.

"Messrs. *C. P. Henderson & Co., Manchester.*

"Dear Sirs,—We have the pleasure to acknowledge receipt of your favour of 24th October, in which you refer especially to the arrangements entered into between your good selves and Messrs. *George Lyall & C. F. Still* for the remittance from this side of cost of your shipments of goods purchased on our account. These arrangements we have now to say will be carefully attended to by us, and remittances will be made in the form appended in your letter. Copies of our letter advising remittances to our friends will be sent to you regularly.

"We are," &c.

In pursuance of the terms agreed upon, Respondents shipped fifty trusses of long ells on board the *Peninsular and Oriental Company's* steamer *Syria,* on account of Messrs. *G. Lyall & C. F.*

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Still, under a bill of lading, The said bill of lading, together with an invoice for the fifty trusses of long ells, were forwarded by the Respondents to the *London* firm of *G. Lyall & C. F. Still*, and by them to the firm of *Lyall, Still, & Co.*, at *Hong Kong*.

The heading of the invoice was as follows:—

"Invoice of fifty trusses of long ells shipped by Messrs. *C. P. Henderson & Co.* per steamship *Syria*, from *London* to *Hong Kong*, and consigned to Messrs. *Lyall, Still, & Co.* there, for realisation, the proceeds to be remitted to Messrs. *George Lyall & C. F. Still, London*, in first-class bank bills, specially to meet their acceptance of *C. P. Henderson & Co.'s* draft, or any renewal thereof, against this shipment, and bought for account and risks of Messrs. *George Lyall & C. F. Still, London*."

The acceptance mentioned in the heading was for £2060 12*s*. 1*d*. sterling, the price of the goods and expenses of shipment. This was dishonoured at maturity, and the Respondents had not, at the date of the transactions after mentioned, been paid for the goods.

During the month of November, 1866, the Appellants purchased from the firm of *Lyall, Still, & Co.*, for the sum of £15,000 sterling, certain bills of exchange drawn by that firm upon a firm trading in *England* under the name of *Chalmers, Guthrie, & Co.*, upon the understanding and agreement that the advance should be covered by shipping documents for silk or other *China* produce. The sum of £15,000 sterling was paid in advance by them to *Lyall, Still, & Co.* at the time they purchased the bills, upon the promise and understanding that the shipping documents should be delivered before the departure of the next outgoing mail for *Europe*.

The firm of *Lyall, Still, & Co.*, failed to deliver the said shipping documents, notwithstanding that they were urgently pressed to do so by the Appellants, and having been threatened by the Appellants with immediate legal proceedings in the event of their failing to fulfil their said contract without further delay, promised the Appellants that if they would abstain from commencing legal proceedings against them, and would consent to release them from their engagement to furnish the said shipping documents for silk and other *China* produce, and allow the said sum of £15,000 sterling, which had been paid to them in advance for the said

bills upon the faith of their undertaking to deliver the said shipping documents as aforesaid, to constitute an ordinary debt for money lent, they would deposit with the Appellants other security for the repayment of the said sum; and they offered to deposit with the Appellants at once, in part fulfilment of such proposed substituted arrangement, a bill of lading for goods of the value of $10,000, or thereabouts, which they stated had already been sold by them to arrive, upon the understanding that the said bill of lading, or the goods represented therein, would be returned to the firm upon payment by them to the Appellants of a sum equivalent to the value thereof.

The Appellants assented to the proposed arrangement in substitution of the original agreement, which the firm of *Lyall, Still, & Co.* were unable to fulfil, and the firm in part performance of the substituted agreement and in consideration of the loan and of the original agreement, on the 14th of December, 1866, handed to the Appellants the bill of lading for fifty trusses or bales of long ells, which bill of lading was indorsed by the firm, and was stated by them to represent the goods which they had sold to arrive, and which were to be redeemable by them on the terms above mentioned.

As to the dealing with the goods, it was alleged by the Respondents that the Appellants took possession of the fifty trusses of long ells under the bill of lading, and realized, and converted the same into money, and received the proceeds thereof, and appropriated the same to the part liquidation and discharge of the said sum of £15,000 sterling.

The Appellants, by their answer, admitted that when the fifty trusses of long ells arrived, they took possession of the goods, but they denied the foregoing statements as to the sale, and stated that the firm of *Lyall, Still, & Co.*, having paid into the Appellants' bank various sums of money equivalent in the whole to the sum of $10,000 above mentioned (which sums were mixed with the general money of the bank) the Appellants gave credit in their books to the firm of *Lyall, Still, & Co.* for an amount equal to those sums, and gave up their lien on the goods, and redelivered the same to the firm; and that during all this time they had no notice of the arrangements under which the goods

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were shipped, or of the invoices, or of any trust attaching thereto. Later in the same month, on the 22nd of December, 1866, *Lyall, Still, & Co.* made a general assignment of their property to the Appellants and to another bank; but the transactions just stated were antecedent to, and, according to the statement of the Appellants in their answer, were quite independent of, that assignment (1).

In the early part of 1867, the firm of *Lyall, Still, & Co.* stopped payment, and the partners were adjudicated bankrupts on the 23rd of May, 1867, at *Hong Kong*.

Under the above circumstances the Respondents filed their bill, whereby they sought to have it declared that the assignment of the bill of lading to the Appellants was void, as being a fraudulent preference of the Appellants (which ground of complaint, however, they gave up at the hearing), and they further prayed that it might be declared that all sums of money received by the Appellants in respect of the fifty trusses of long ells, had been received by them in trust for the Respondents, and that inquiries might be directed as to the said sums of money, and that the Appellants might be decreed to pay to the Respondents all the said sums of money, with interest.

The Chief Justice, in effect, decreed that the Respondents were entitled to have the proceeds of the sale by the Appellants of the long ells, and interest thereon at 12 per cent., paid to them, so far as the same extended, or as might be necessary to recoup them the sums they had paid in taking up the bills which they had drawn for the price and the amount of commissions and incidental expenses, and interest on these amounts at 4 per cent.

The learned Judge made this decree upon the ground that Mr. *Kaye*, the resident agent of the Appellants, had when he accepted the hypothecation of the bill of lading, notice of the insolvency of the firm of *Lyall, Still, & Co.*, and that as such agent he could not (in accepting the bill of lading of the long ells, the goods in question, from the bankrupts, though the goods were then in the harbour) have any higher title to them against the Respondents than the bankrupts had, and that in the bankrupts' hands the goods were clearly subject to a trust to provide by sale funds to meet the bills drawn against the goods.

(1) See *Rodger* v. *The Comptoir d'Escompte de Paris*, Law Rep. 2 P. C. 393.

From this decision the Defendant appealed to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Joseph Brown*, Q.C., and Mr. *H. M. Jackson*, Q.C., with whom was Mr. *F. Meadows White*, for the Appellants:—

There have been two cases before the Privy Council arising out of the transactions between these parties, and the question is under which of the two the present appeal falls.

The cases which shew how the law stands on this subject are collected in the report of *Rodger* v. *The Comptoir d'Escompte de Paris* (1). The facts of that case were different from the present. There it was held that the words of the instrument of assignment did not carry a greater interest than the assignee had; and the bill of lading which purported to be assigned had not arrived. The real question in that case is stated to be whether value had been given for the bill of lading, the firm not having possession of the documents at the time.

The recent case, *Henderson* v. *Le Comptoir d'Escompte de Paris* (2), is parallel to the present one; the legal and equitable title were there united. We rely on the bill of exchange indorsed to us while the goods were in the harbour, whereby we became in possession.

In the recent case we gave up some documents. Here we did not give up any document; but gave up our claims to have documents, and forbore to sue. In *Rodger's Case* (1), the Court held that the transaction of the 22nd of December was governed by the rule that the assignee had no greater rights than the assignor. In *Henderson* v. *Le Comptoir d'Escompte de Paris* (2), the agreement was the same as in this case; and the Court held that the legal claim ought to prevail against the secret trust. Where personal estate not transferable at law, is purchased from a trustee, the purchaser cannot hold it on a higher footing than the trustee.

In the present case, *Henderson & Co.* had a mere undertaking of an unusual kind, and unknown to those who were dealing with *Lyall & Co.* at *Hong Kong*. *Rodger's Case* proves only that the consignment was not sufficient to bar the vendor's right of stop-

(1) Law Rep. 2 P. C. 393. (2) *Supra*, p. 253.

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page *in transitu*. The law recognises certain acts which will defeat the vendor's right, and the judgment merely decided that the circumstances in that case were not sufficient to do so.

Lord *Eldon* contrasting land with chattels, says (1), chattels are held by possession and land by title; we actually got possession afterwards. There is a clear distinction in bankruptcy, where one security is given up in consideration of receiving another. We got our possession for valuable though not present consideration, and we are not charged with notice.

The *Attorney-General* (Sir *R. Baggallay*), and Mr. *Dundas Gardiner*, for the Respondents:—

In the present case it was known to the bank that *Lyall, Still, & Co.* were in straits. That is shewn by the very nature of the transaction, when *Lyall, Still, & Co.* offered to deposit with them the bill of lading of goods which had been sold to arrive. To give a perfect title in such a case as this, where there is a prior equity in others, there ought to be possession of the bill for value given, and there should be no notice of insolvency. Here there was no money advanced or promised; and the transaction must have been entered into in contemplation of the general assignment of *Lyall & Still's* property to the two banks, which was made immediately after. In the case of *Henderson* v. *The Comptoir d'Escompte de Paris* (2), the Judicial Committee held that it was not a conflict between different equities, but that the bank combined the legal and the equitable title. The present case is different; the principle of *Rodger's Case* (3) applies. The bank admits that *Lyall, Still, & Co.*, paid off $10,000 of their debt. Their case is, that having got possession of the goods, they sold them through *Lyall, Still, & Co.*, as agents. The sale by *Lyall, Still, & Co.*, was on their own behalf, not for the bank. The goods were sold; and the amount for which the goods were pledged was paid. They gave up their lien. Beyond doubt the Respondent had a lien on the goods. Did the Appellants acquire a preferable right? It is impossible to believe the story as told by the bank. Probably the goods were sold by *Lyall, Still, & Co.*, but not for the bank. It was better worth their while to pay

(1) 13 Ves. 114. (2) *Supra*, p. 253. (3) Law Rep 2 P. C. 393.

their immediate creditors at *Hong Kong*, than resist; so *Lyall, Still, & Co.* themselves sold and handed over the proceeds to the bank. They were in possession of the bill, and the ship was in the harbour; by the bank's own statement it had possession of the shipping documents for a short time.

Their Lordships' judgment was delivered by

SIR BARNES PEACOCK :—

In this case the *Chartered Bank of India, Australia, and China* are the Appellants, and *Charles Paton Henderson* and *Colin George Ross* are the Respondents. The Respondents were the Plaintiffs in a suit brought in the Court of *Hong Kong* against the Appellants, and they sought to recover from them in that suit a sum of money which they had received under a bill of lading indorsed to them by Messrs. *Lyall, Still, & Co.* The Plaintiffs in the first paragraph of the prayer of their bill ask, "That it may be declared that the assignment of the said bill of lading to the Defendant was and is void, as being a fraudulent preference of the Defendants." That point is given up, and no question now arises upon it. Then in the second paragraph of the prayer they ask, "That it may be declared that all sums of money received by the Defendants in respect of fifty trusses of long ells, to which the bill of lading related, have been received by them in trust for the Plaintiffs." Now the question is whether the bank received the proceeds of those goods in trust for the Plaintiffs or on their own account. There is no doubt that Messrs. *Lyall & Still* in *London* purchased the goods from Messrs. *Henderson & Co.* on the terms expressed in the letter of the 1st of September, 1866, which is set out at page 5 of the record, viz., that the invoices should state that the proceeds of the shipments were to be remitted to Messrs. *Lyall & Still*—they being the firm in *London*—in first-class bank bills specially to meet the acceptance of Messrs. *Henderson & Co.'s* draft against the shipment. The goods had been paid for by an acceptance of Messrs. *Lyall & Still,* and the stipulation was that they should send them out to their firm of *Lyall, Still, & Co.* in *Hong Kong*, and that the firm there should remit the proceeds to *Lyall & Still* in *London* in order that they

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should therewith take up the bill which they had accepted in payment for the goods. It may be admitted for the purpose of this case that the stipulation that the proceeds of the shipments were to be remitted in first-class bills created a trust on the part of *Lyall, Still & Co.* not to pledge the goods, but so to deal with them that they should obtain the value of them, and remit the proceeds for the purpose of taking up the bill. But, assuming that such a trust was created between Messrs. *Lyall, Still & Co.* and Messrs. *Henderson & Co.*, the question is whether the bank were bound by that trust.

Now the bill of lading was sent out to *Lyall, Still, & Co.*, and on the 14th of December they, having it in their possession, indorsed and delivered it to the bank. The consideration for which they indorsed it is set out in the answer of the Defendants. Paragraph 16 states, "The Defendants admit that during the month of November, 1866, they purchased from the said firm of *Lyall, Still, & Co.* for the sum of £15,000 sterling certain bills of exchange drawn by the said firm upon a firm trading in *England* under the name of *Chalmers, Guthrie, & Co.*, upon the understanding and agreement that the said advance should be covered by shipping documents for silk or other *China* produce; the said sum of £15,000 sterling was paid and advanced by them to the said firm at the time they purchased the said bills upon the promise and understanding that the said shipping documents should be delivered before the departure of the next outgoing mail for *Europe*." It appears then that the bank purchased bills of exchange to the extent of £15,000 from Messrs. *Lyall, Still, & Co.*, and that they paid them the amount upon the stipulation that Messrs. *Lyall, Still, & Co.* were to hand them over shipping documents to the extent of the bills. They then go on in paragraph 17 to shew that Messrs. *Lyall, Still, & Co.* failed to perform that agreement. They say, "The Defendants do not know whether the said firm of *Lyall, Still, & Co.* were unable to deliver to them such shipping documents as aforesaid, or to repay the said advance, but they admit that the said firm failed to do so notwithstanding that they were urgently pressed to do so by the Defendants; and the said firm having been threatened by the Defendants with immediate legal proceedings in the event of their failing to fulfil their said contract without further delay,

promised the Defendants that if they would abstain from commencing legal proceedings against them, and would consent to release them from their engagement to furnish the said shipping documents for silk and other *China* produce, and allow the said sum of £15,000 sterling which had been paid to them in advance for the said bills upon the faith of their undertaking to deliver the said shipping documents as aforesaid to constitute an ordinary debt for money lent, they would deposit with the Defendants other security for the repayment of the said sum; and they offered to deposit with the Defendants at once in part fulfilment of such proposed substituted arrangement, a bill of lading for goods of the value of $10,000 or thereabouts,"—the bill of lading in question—"which they stated had already been sold by them to arrive, upon the understanding that the said bill of lading or the goods represented therein would be returned to the said firm upon payment by them to the Defendants of a sum equivalent to the said value thereof." Then paragraph 18 says: "The Defendants admit that they assented to the proposed arrangement in substitution of the original agreement which the said firm of *Lyall, Still, & Co.* were unable to fulfil as aforesaid; and the said firm in part performance of the said substituted agreement, and in consideration of the said loan and of the said original agreement, handed to the Defendant the bill of lading for fifty trusses or bales of long ells, mentioned in paragraph 18 of the said bill of complaint, which said bill of lading was indorsed by the said firm and was stated by them to represent the said goods which they had sold to arrive, and which were to be redeemable by them on the terms aforesaid."

It appears that the bill of lading was indorsed and handed over by Messrs. *Lyall, Still, & Co.* to the bank in consideration of the bank's releasing them from the obligation which they had come under to hand over shipping documents of the value of £15,000, and of their undertaking not to take the legal proceedings, criminal or civil, which they had threatened. It appears, therefore, to their Lordships that there was a sufficient consideration for the indorsement of the bill of lading by Messrs. *Lyall, Still, & Co.* to the bank.

Then, had the bank notice of the trust which had attached to the proceeds of those goods in the hands of Messrs. *Lyall, Still, &*

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Co.? The bill does not charge that they had notice of the trust or of the terms upon which the goods had been sold by Messrs. *Henderson & Co.* It is not found by the learned Judge who tried the case that they had such notice, nor is it probable that such a notice would have been given. Messrs. *Lyall, Still, & Co.* were under an obligation to deliver shipping documents to the bank; they were unable to do so, and the bank threatened legal proceedings against them, and to proceed against them criminally; and then, in order to induce the bank to stay these proceedings, Messrs. *Lyall, Still, & Co.* say, we will treat this £15,000 as a loan, you release us from the obligation to give the shipping documents, and if you do that we will indorse and hand over to you this bill of lading. Is it likely that when they wanted to induce the bank to release them from the obligation to deliver shipping documents and to accept the bill of lading in lieu thereof, they would have said we will hand over a bill of lading which is subject to such a trust that when the goods are sold you will not be able to receive the proceeds? It is most improbable that they would have given such a notice to the bank when they indorsed the bill of lading under the circumstances stated.

The bill of lading having been indorsed to the bank for a valuable consideration and without notice, passed the legal interest in the goods to the bank. Apparently, from the statement in the answer, the goods were actually delivered over to the bank, so that the legal interest passed to the bank not only by the delivery of the goods but by the indorsement of the bill of lading. But even assuming that the bank did not obtain actual delivery of the goods, there is no doubt that the indorsement of the bill of lading for valuable consideration passed the legal interest in the goods to the bank.

There is a distinction between this case and the one which was cited of *Rodger* v. *The Comptoir d'Escompte de Paris* (1). In that case the question was whether the goods could be stopped *in transitu*, and whether the indorsement of a bill of lading prevented the unpaid sellers from stopping the goods in consequence of the insolvency. Sir *Joseph Napier*, in delivering the judgment in that case, said:—"The general rule so clearly stated and explained by

(1) 5 Moore's P. C. Cases (N.S.) 538; Law Rep. 2 P. C. 393.

Lord *St. Leonards* is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule, was not disputed; but it was contended that the case of a bill of lading is exceptional and must be dealt with on special grounds. Doubtless the holder of an indorsed bill of lading may, in the course of commercial dealing, transfer a greater right than he himself has. The exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorized possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid, one of two innocent parties must suffer by the act of a third, and it is reasonable that he who by misplaced confidence has enabled such third person to occasion the loss should sustain it." His Lordship cited the well-known case of *Lickbarrow* v. *Mason* (1) as an authority for that position. Then he went on to consider whether there was any valuable consideration for the indorsement of the bill of lading, and shewed that it was indorsed and handed over in pursuance of a previous agreement of the 26th December, 1866, which is also set up in this case, by which the parties agreed to transfer all goods and bills of lading or other documents for all goods "now on the way hither, to arrive in December, 1866, or January, 1867." The bill of lading was not handed over, nor had it even arrived at the time when the agreement was entered into. Sir *Joseph Napier* goes on to say,—"But in this case, at the time of the assignment *Maclean* had not possession of the documents. Nothing was advanced on the faith of them. There is merely a general description of the documents expected to arrive, without knowing their contents, or how far they might be limited or qualified. The property of the firm in the goods expected was not only subject to special stipulations in the contracts of sale in the case of two of the three parcels, but was also subject in all the three to the lien of the unpaid vendors." Then he says, "Doubtless the vendor's claim cannot prevail against the claim of

(1) 1 Sm. L. C. 699.

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a transferee for value given on the faith of a negotiable security fairly and honestly taken. To the extent to which he has so given value, he has a prior claim. But the rule is founded on the reason of it as already explained, *cessante ratione cessat ipsa lex.* Where there is no advance made or value given upon the faith of the documents, where the object is simply by a sweeping clause to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent for an improvident advance made upon the faith of a totally different security, where upon the true construction of the assignment no interest passed that would place the assignee in a better position than the assignor, it appears to their Lordships that such a transfer so made, and under such circumstances, cannot be held sufficient to defeat the vendor's claim." But the present case differs from that case, inasmuch as on the 14th of December, 1866, the bill of lading was in the hands of *Lyall, Still, & Co.*, and they indorsed and handed it over to the bank for the considerations to which allusion has already been made. It was handed over at that time for a valuable consideration.

Now it must be taken that the consideration for the deposit by the said firm of *Lyall, Still, & Co.* with the Defendants of the said bill of lading was the release of the said firm from their original contract to supply shipping documents of *China* produce, the substitution of a new agreement, and the abandonment of the threatened legal proceedings. The Defendants admit that on the 22nd of December, 1866, the said firm of *Lyall, Still, & Co.* did execute the writing or document set out in the 21st paragraph of the said bill, and that the said writing or document purports to be an assignment of the property therein mentioned to the Defendants jointly with the *Comptoir d'Escompte de Paris.* They admit that the said assignment, and the facts relating thereto, were the subjects of a suit recently heard and decided. It is, in fact, the same agreement as that set up in *Rodger's Case* (1); but they say that the deposit of the said bill of lading for the said fifty trusses of long ells by the said firm of *Lyall, Still, & Co.* with the Defendants was a transaction anterior to and independent of the said

(1) Law Rep. 2 P. C. 393.

assignment, and had no relation thereto or therewith. Their Lordships are of opinion that the transfer of the bill of lading in this case was for a valuable consideration. It was transferred on the 14th of December, and had no relation to the document which was executed on the 16th of December. This case differs entirely from *Rodger's Case* (1), because the bill of lading in that case was not handed over at the time, but was handed over in pursuance of the agreement generally, to hand over all bills. In this case it was handed over specially at the time in consideration of the release and of the abandonment of proceedings for not delivering over the shipping documents. It therefore appears that the bank did obtain the legal right to the goods by the indorsement of the bill of lading for a valuable consideration, and whether they afterwards actually received possession of the goods or not they had a legal title to them, without notice, and that legal title was not affected by the equity arising out of the circumstances under which the goods were sold by Messrs. *Henderson & Co.* to *Lyall, Still, & Co.*

This case comes entirely within the case of *Henderson & Co.* v. *The Comptoir d'Escompte de Paris* (2), in which their Lordships held that the bank got the legal title to the goods, and that that legal title was not affected by the equity arising from the terms upon which the goods were originally sold.

It was suggested that probably the bank gave back the bill of lading in consideration of *Lyall, Still, & Co.'s* handing over to them the proceeds which they had received from the purchasers; that *Lyall, Still, & Co.* having got the proceeds which had been paid to them in anticipation, they handed over those proceeds, got the bill of lading back, and then handed over the goods to the purchasers. Even if *Lyall, Still, & Co.* did sell the goods and receive the proceeds from the purchasers, and hand over the money to the bank, the bank would not be affected by the equity between Messrs. *Lyall, Still, & Co.* and Messrs. *Henderson & Co.*, as they had no notice of the terms upon which the goods were sold, and when *Lyall, Still, & Co.* handed over to the bank the money which they had received as payment for the goods, the bank got a

(1) Law Rep. 2 P. C. 393.

(2) *Ante*, p. 253.

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legal title to the money, and was not affected by any equity which might exist between Messrs. *Henderson & Co.* and *Lyall, Still, & Co.* arising out of the agreement under which the goods were sold. Therefore, under no circumstances were the bank liable or affected by the equity existing between Messrs. *Henderson & Co.* and *Lyall, Still, & Co.*, and they cannot be declared to be trustees for Messrs. *Henderson & Co.* of the proceeds of the goods.

Under these circumstances their Lordships will advise Her Majesty that the suit cannot be maintained, that the decision of the learned Judge ought to be reversed, and that the bill be dismissed with costs in the Court below, and the costs of this appeal.

Solicitors for the Appellants: *Linklater & Co.*
Solicitors for the Respondents: *Travers Smith & Co.*

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HENRY PETER PISANI . . . . . APPELLANT;

AND

HER MAJESTY'S ATTORNEY-GENERAL FOR GIBRALTAR, DAVID MOSES BENAIM, NATALE ESTEBAN LEPRI, JOSEPH SHAKERY (SINCE DECEASED), AND FRANCIS SHAKERY AND VICTORIA SHAKERY (LATE INFANTS, BUT NOW OF FULL AGE) . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR.

Consent—Waiver of Appeal—Purchase by Solicitor from Client.

An information by way of bill of complaint was by consent amended by the introduction of the words "That the rights, if any, of the several Defendants may be ascertained and declared by decree of this Honourable Court, and that they may be ordered to pay each to the others and other of them

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

their and his costs of this suit, and that this Honourable Court will give such further directions in the premises as shall be necessary." There was no stipulation that the right of appeal should be given up, and it appeared that the parties never contemplated that they were ceasing to keep the cause *in curia*, or that the Judge was to hear it otherwise than as a Judge, or that it was not to go on subject to all the incidents of a cause regularly heard in Court:—

Held, that the right to appeal had not been waived.

A party to a suit, who, knowing that certain other parties are infants, agrees that a certain course should be taken in the suit, cannot afterwards object that his consent does not bind him because the other parties were infants and could not consent.

Where it is alleged that the bringing an appeal is contrary to agreement, the objection ought to be made when leave to appeal is applied for, or to be taken by a petition to the Queen before the appeal comes on for hearing.

The Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of shewing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser. The circumstances of the employment may be considered, and the amount of influence estimated:—

Semble, an attorney purchasing from his client ought to insist on the intervention of another professional adviser.

THIS was an appeal from the Supreme Court of *Gibraltar*. The facts were shortly as follows:—

Miss *Manuela Porro*, who resided at *Gibraltar*, and owned some real property there, made her will in 1858, whereby she specifically devised it to the Respondents, *Lepri* and *Joseph Shakery*, in trust for *Joseph Shakery's* two children, the Respondents *Francis Shakery* and *Victoria Shakery*, equally for life, with remainder to their respective children in fee, as therein mentioned; and she appointed the trustees to be also her executors. In 1868, in consideration of an annuity of $1500 for her life, she sold and conveyed the property to the Appellant, Mr. *Peter Henry Pisani*. She died soon after, in the same year, after a short illness, during which she executed a will, which was prepared at her request by the Appellant, and whereby she revoked all former wills, and bequeathed her personal estate to one Mr. *Gonzales*, as her executor, in trust for three charities.

After Miss *Porro's* death the will of 1868 was proved by the executor. The Attorney-General of *Gibraltar* then filed an information claiming for the Crown the lands which had belonged to

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her as having escheated for want of heirs. He made Defendants the Appellant *Pisani*, a person called *Benaim*, who asserted that the Appellant held the lands as a trustee for him, and also the Respondents *Lepri* and the *Shakerys*. The case made against the Appellant was, that he was Miss *Porro's* legal adviser, and had, by an abuse of professional confidence, induced her to sell him the land at an undervalue. The original prayer of the information was, that the deed of conveyance to the Appellant should be declared void and should be delivered up to be cancelled, and that it should be decreed that Miss *Porro* died without heirs and intestate, the information alleging that the will of 1858 was revoked by the will of 1868. The Attorney-General, however, failed to establish the title of the Crown by escheat, but, upon his motion, and by consent of all parties, the information was amended by inserting in it the following words:—"That the rights, if any, of the several Defendants may be ascertained and declared by decree of this Honourable Court, and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that this Honourable Court will give such further directions in the premises as shall be necessary." No one represented the parties interested under the later will after the above-mentioned amendment had been made, and the Attorney-General endeavoured to shew that the later will was invalid, as having been obtained by the undue influence of the Appellant and others when the testatrix was *in extremis*.

By the decree of the Supreme Court of *Gibraltar*, it was declared and ordered that the lands had not escheated to the Crown; that the deed of conveyance to the Appellant should be delivered by him into Court to be cancelled; that the will of 1868 was void and inoperative, and that the will of 1858 was valid.

The Attorney-General, for the Crown, and also Mr. *Benaim* acquiesced in this decree, but Mr. *Pisani* appealed against it to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Kay*, Q.C., and Mr. *W. W. Karslake*, appeared for the Appellant.

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Mr. *Fry*, Q.C., and Mr. *Bagshawe*, Q.C., for the Respondents.

The Counsel for the Appellant and the Counsel for the Respondent respectively took preliminary objections to the hearing; the first contending that the decree should be reversed without hearing the appeal on the merits; the latter, that the appeal was not competent and should be dismissed.

1874
May 14.

The decision of their Lordships on these objections was pronounced by

SIR MONTAGUE E. SMITH:—

Their Lordships desire to state shortly the grounds why they cannot yield to either of the preliminary applications which have been made to them: one by Mr. *Kay* to reverse the decree without hearing this appeal on the merits; the other by Mr. *Fry* to dismiss the appeal.

It will be sufficient for this purpose, without going at length into the facts of the case, to mention that the suit was an information by the Attorney-General, claiming, for the Crown, lands which had belonged to a lady, *Manuela Porro*, as escheated for want of heirs. He made Defendants to the information *Pisani*, the Appellant, who claimed under a deed of purchase; a person called *Benaim*, who asserted that *Pisani* was trustee for him; and also the present Respondents, *Lepri* and the two *Shakerys*, the former being the trustee and the latter the infant *cestuis que trust* under a will of Miss *Porro* made in the year 1858. The Attorney-General failed to establish the title of the Crown by escheat, and thereupon the suit as originally framed ought to have been dismissed. But in the course of the cause the opposing claims of the Defendants among themselves became clear, and it was proposed that the information should be amended for the purpose of enabling the Court to determine and declare what those rights were. Such an alteration of the suit could only have been made, it is admitted, by consent, and the question raised by Mr. *Kay* yesterday was whether there was an agreement to the effect that the suit should be so altered as to give the Court power to declare in that suit the rights of the Defendants between themselves. He denied that such an agreement was, in fact, come to.

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Now, what is stated in the record sent to their Lordships as the result of some proceedings on the 3rd of May, 1869, and what is recorded on the Judge's note, is that the Attorney-General applied for leave to amend by inserting an averment in the information by consent. The note is this: "Her Majesty's Attorney-General for *Gibraltar*, before proceeding with the hearing, moved that the original information by way of bill of complaint filed by him in this Honourable Court, and partly heard, be amended by inserting the following words:—'That the rights, if any, of the several Defendants may be ascertained and declared by decree of this Honourable Court, and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that this Honourable Court will give such further directions in the premises as shall be necessary.'" Then the note states, *Stokes* and *Cornwell* of counsel for the Defendant *Pisani*, *Recano* of counsel for *Lepri*, *Shakery*, *Shakery*, and *Shakery*, and *Relph* of counsel for the Defendant *Benaim*, being present and consenting, "the amendment was ordered accordingly." A formal consent order was drawn up, and it has been sent over with the record.

It was contended by Mr. *Kay* that this was merely an amendment of the information, leaving the question open to be decided whether effect ought to be given to it. Their Lordships, however, think that this is not the true meaning of what was done. It is plain that the amendment was agreed to in view of the probable failure of the Attorney-General upon the original information. In fact, the amendment appears to have been made and the agreement come to at a time when his defeat was imminent. If the Attorney-General had succeeded in the suit the amendment would have been perfectly useless, since he could not succeed without defeating the claims of all the parties Defendants. He must have swept the board clear of the Defendants before he could have obtained a decree for the Crown on the ground that the property had escheated. It is evident, therefore, that the object of this amendment must have been to give the Court power to declare the rights of the Defendants between themselves in the event of the failure of the Attorney-General. No doubt that is a wide departure from the ordinary procedure of the Court. It clearly

could not have been done without consent; and the only question that is raised on this preliminary application is whether there was an agreement in fact that the Judge should hear the cause and decide the rights of the parties upon that footing. Their Lordships think, having regard to the considerations to which they have alluded, that this really was the intention of the parties, and this is corroborated by the view that has been presented to them of the subsequent course of the cause. It is clear that the Judge and all parties considered that such an agreement had been come to. As soon as the amendment had been made the Judge formally records that "The Attorney-General then read the amendment to the prayer of the bill, as ordered this day by the Court, to declare and ascertain the rights of the several Defendants."

Their Lordships, therefore, have come to the conclusion that there was an agreement by the Defendants, not merely to an amendment of the pleadings, but that their rights as between themselves should be declared, whatever might be the event of the suit regarding the claim of the Crown. It is enough, upon this preliminary application, to say that this agreement is proved; their Lordships reserving to themselves full power to determine in what way justice can best be done between the parties, wher they come to hear the merits of the appeal.

An objection was taken that the agreement was invalid, and did not bind any of the parties, because there were two infants, Defendants, for whom consent could not be given. It is to be observed that, in the state in which matters stood at the time when the agreement was come to, it was apparently for the benefit of the infants, who thereby obtained the assistance of the Attorney-General, that such an agreement should be made; and further, whether that be so or not, their Lordships think that Mr. *Pisani*, after entering into it with a knowledge of the fact that the parties were infants, cannot be now heard to object that his consent does not bind him.

Then we come to Mr. *Fry's* application. He, for the Respondent, not only contended that the agreement was made and was binding, but urged what is really a preliminary objection, that the decree, so far as it declares the rights of the Defendants, must be regarded as the award of an arbitrator, and consequently that the

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appeal is incompetent. Their Lordships would be most unwilling to uphold the agreement at all if this were to be the effect of it, because, in their opinion, such a result would be opposed to the intention of the parties. They clearly meant to keep themselves *in curia*, and the Judge clearly so understood them. It is plain also that the parties and the Judge thought that an appeal was open. It is true that there was a deviation from the *cursus curiæ*, but the Court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal.

The cases referred to by Mr. *Fry* do not bear out his contention. The first he cited, and the only one where the appeal was declared incompetent, is the case of *White* v. *Duke of Buccleuch* (1). In that case the Court made an order *ultra vires*. The interlocutor directed a surveyor to set out a road, deputing to him an authority which the Court had no power to give. The interlocutor appears to have had this vice, that the Court either had no jurisdiction to make such an order at all as to the road, or, having it, could not delegate it to the surveyor. The Lord Chancellor, in giving his opinion to the House, puts the objection upon the ground that the Court had made an interlocutor which was *ultra vires*. He says: "The Court below had no power whatever to direct a road to be laid out equally convenient to that which the public were clearly entitled. They have not given the public any way which they had been accustomed to use, but they have consulted the convenience of the Defender, and they have directed Mr. *Wylie* to ascertain a road which will be equally convenient to the public with that to which they were entitled, and not inconvenient to the Defender. There is no doubt whatever, therefore, that in this interlocutor, the Court having proceeded *ultra vires*, all the subsequent interlocutors which were founded on this as their basis

(1) Law Rep. 1 H. L., Sc. 70.

were taken out of the judicial course, and consequently were not a subject of appeal."

In another case, cited from the same volume, *Bickett* v. *Morris* (1), the Lord Ordinary had heard, by consent, a case which ought to have been tried in the Jury Court. There was in that case the assumption on the part of the Lord Ordinary of the duty of another tribunal, and the observations made by the Lord Chancellor point to that state of things. The objection is noticed in this way by the Lord Chancellor: "The first question to be considered is the competency of the present appeal. It appears to me that this is one of the actions appropriate to the Jury Court under the 28th section of the *Scotch Judicature Act* (6 Geo. 4, c. 120), being an action on account of injury to land in which the title was not in question. By the word 'title' I do not understand to be meant the right to do the act which occasioned the injury, but the title to the land itself to which the injury is alleged to be done." Then he says, after going through the facts: "The cause ought, therefore, in regular course, to have been remitted to the Jury Court, and the Lord Ordinary had no authority to order the proofs to be taken by commission." But in that case their Lordships did not hold that the appeal was wholly incompetent, for they retained it, and heard the cause on the merits. They held the objection had been waived by the appeal which had been made from the Lord Ordinary to the Inner Court. That case, therefore, shews that the House of Lords considered that it was discretionary with the House to hear the appeal or not; that it was not beyond their jurisdiction to hear it; and that the objection pointed to an irregularity only, capable of being waived.

The remaining case referred to was before Lord *Cottenham*, *Stewart* v. *Forbes* (2). There the Vice-Chancellor had undertaken to determine a fact proper for the jury. On looking into that case, it appears that the Lord Chancellor at first inclined not to hear the appeal, but in the end thought himself bound to hear it He says this: "In a celebrated case of legitimacy, *Morris* v. *Davies* (3), Lord *Lyndhurst* adopted a similar course"—that is, a course similar to that of the Vice-Chancellor in the case then

(1) Law Rep. 1 H. L., Sc. 47. 12 Jur. N. S. 803.
(2) 1 Mac. & G. 145. (3) 5 Cl. & F. 163.

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under appeal—"and upon appeal to the House of Lords from his decision the House thought itself bound to consider and decide upon the case so entertained by the Court of Chancery, though not according to the usual course of its jurisdiction. I did not, therefore, feel myself at liberty to decline hearing the cause, although the parties had, by their consent recorded in the decree appealed from, precluded themselves from asking for, or me from directing, an investigation of their claims before a jury, the only proper tribunal for the purpose if the matter were really one of doubt." Therefore, in the end, Lord *Cottenham* came to the conclusion that he was not at liberty to decline to hear the appeal. He goes on to say:—"Besides which, I thought that the Plaintiff ought to be permitted to shew, if he could, that what he claimed was so free from doubt as to entitle him to the decree which he now asks." That is really a subordinate reason. His first ground is that he thought he was bound to hear the appeal.

The case of *Morris* v. *Davies* (1), to which Lord *Cottenham* referred, seems to their Lordships to be a strong authority against Mr. *Fry's* objection. In that case there had been a trial before a jury, a motion for a new trial, and a decision that a new trial ought to be granted. But instead of sending it down for a new trial, Lord *Lyndhurst*, by the consent of the parties, heard and disposed of the case. Upon an appeal to the House of Lords an objection was formally taken by the Attorney-General to the competency of the House to hear the appeal. The case is reported in the 5th *Clark* and *Finelly's* Reports, and the objection of the Attorney-General appears on p. 222. "The Attorney-General and Mr. *Temple*, for the Respondents, took a preliminary objection, insisting that no appeal lay from a decree to which all the parties by their Counsel consented to submit in order to save the expense and delay of another trial at law. The parties could not be then placed in the same relative situation for a new trial if the decree should be reversed." After an argument by the Counsel for the Appellant, Lord *Lyndhurst* said:—"When I proposed to the parties to decide the question upon the evidence they were to lay before me, instead of sending it again for trial before a jury, I did not consider that my decree was to be exempt from appeal. I never contemplated such

(1) 5 Cl. & F. 163.

a consequence. The saving expense and further delay was my object." Now, this appears to have been the object in the present case; the parties, as it appears to their Lordships, never contemplated that they were doing other than keeping the cause *in curia*, or that the Judge was to hear it otherwise than as a Judge, or that it was not to go on subject to all the incidents of a cause regularly heard in Court, of which an appeal is one of the most important. The Judge clearly so understood the arrangement. To recur to *Morris* v. *Davies* (1), the Lord Chancellor says:—"The House cannot entertain the objection to the regularity of the appeal." Then he says:—"That objection was disposed of by the Appeal Committee upon evidence which is not before the House." We have only the record of the decree before us, and in that no consent appears not to appeal. If it were alleged that the appeal was brought in breach of good faith, the House might put off the hearing until the objectors produced proof of that allegation. It is admitted that there was a consent, but how far it was meant to extend is the matter in dispute. It nowhere appears that the parties agreed that the decree should be final and conclusive. In *Morris* v. *Davies* (1) there was a consent that the cause should be heard in an unusual way, upon which Lord *Lyndhurst* acted, and although it was not put into his decree, it was regarded as a perfectly binding consent, which might be proved *aliunde*. The House of Lords gave effect to this consent according to the intention of the parties, for it was allowed to operate so as to make Lord *Lyndhurst's* judgment, which would have been otherwise irregular, a regular judgment, and was not allowed to operate so as to deprive the party of his right of appeal, which had not been stipulated for. That case is in these points not unlike the present.

For these reasons, considering also that this objection was not taken in the Court below when an application was made for leave to appeal; that it was not taken here, as it might have been, by a petition to the Queen before the appeal came on for hearing; and, considering, also, that this Board has always exercised a large discretion in dealing with matters of procedure on appeals from Colonial Courts, their Lordships think that they ought to hear this appeal on its merits.

(1) 5 Cl. & F. 163.

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[Mr. *Kay*, Q.C., then proceeded to open the appeal.]

Mr. *Kay*, Q.C., and Mr. *W. W. Karslake*, for the Appellant:—

Miss *Porro's* property was in bad repair, and tenanted by a bad class of persons; her title was not a perfect one, as it depended on the death of her eldest brother *José*, which had never been fully substantiated. She wanted to get rid of the property for an annuity and to go and live at *Seville*; with this view she had offered it, in vain, to different persons for a lower price than the Appellant gave her. She was in fair health, and might have lived many years. The Appellant was sent for by her unexpectedly to examine the documents which had been prepared for her execution on the occasion of an intended sale. He did not know her before. This intended sale having gone off, he did all in his power to induce a more desirable purchaser to buy, and when the latter, after agreeing to give an annuity of $1500, declined to complete, the Appellant offered the same price, but requested that the vendor would employ a legal person to act on her behalf. That was not done; but her own man of business, *Gonzales*, acted for her. The Appellant was afterwards called in to make her will, when she was sinking rapidly, but he did so only under pressure, and his being employed in this business is no evidence of his having been then in her confidence.

Notwithstanding this new and accidental employment by Miss *Porro*, the Appellant was not in confidential relations with her as an attorney is with his client. But taking it upon that footing, there are cases to shew that an attorney may purchase from his client when he gives as good a price as any one else would give, and takes due care of the interests of his client. In the cases where transactions between people so connected have been set aside, there has always been some failure in duty; either the value was inadequate or due inquiry was not made: *Holman* v. *Loynes* (1); *Cane* v. *Lord Allen* (2); *Edwards* v. *Williams* (3); *Montesquieu* v. *Sandys* (4); *Spenser* v. *Topham* (5); *Gresley* v. *Mosely* (6).

The decree is clearly wrong in directing the deed of con-

(1) 4 De G. M. & G. 270.
(2) 2 Dow. 289.
(3) 32 L. J. (Ch.) 763.
(4) 18 Ves. 302.
(5) 22 Beav. 576.
(6) 8 De G. & J. 321; 1 Giff. 450.

veyance to be cancelled; which would take the property from the Appellant without compensation, even if he had laid out money upon it. It is also wrong in dealing with the later will, the interests under which were unrepresented.

Mr. *Fry*, Q.C., and Mr. *Bagshawe*, Q.C., for the Respondents:—

The value of the land was greater than that given by the Appellant; it would have been worth a larger sum for building. The lady was in delicate health, and there is some evidence that hers was not an average life; the Appellant ought to have had her life properly valued—more might have been done to investigate the state of her health. No solicitor can buy if there is any one else who will give as much as he—he should have given longer time for consideration to Mr. *Benaim*, who had property adjoining, and who was disposed to give more than the Appellant did. Some steps ought to have been taken to ascertain whether the property could be sold at an advance. *Gibson* v. *Jeyes* (1) is the leading case on this subject; and the circumstances were more in favour of the solicitor than in this case, yet Lord *Eldon* set aside the transaction.

A man of business, if he undertakes duties which may be conflicting, must deal as hardly with himself as he would with a stranger; it is almost impossible for him to make a bargain with himself that will stand. The security prepared by the Appellant was insufficient and did not carry out the instructions of *Gonzales*, who, besides, was no lawyer. In *Savery* v. *King* (2) the solicitor gave more than others would give, but the transaction was not allowed to stand. In *Holman* v. *Loynes* (3) the sale was quashed because the attorney might have made a better inquiry into the health of his client. The auctioneer, indeed, knew the value of the property, which was not the case here. In *Gresley* v. *Mosely* (4) the Judge blamed the attorney for not ascertaining the value. Where a solicitor who has recently acted for the vendor deals with him without the intervention of another solicitor, there must be in some sense a continuance of confidential relations between them: *Montesquieu* v. *Sandys* (5); *Salmon* v. *Cults* and *Cults* v. *Salmon* (6).

(1) 6 Ves. 266.
(2) 5 H. L. C. 627. 2 Jur. N.S. 503
(3) 4 De G. M. & G. 270; S. C. 18 Jur. 839.
(4) 4 De G. & J. 78; 1 Giff. 450.
(5) 4 De G. M. & G. 276.
(6) 4 De G. & Sm. 125.

(4 SC 4 Jur. N.S. 718 5 L. 583 8 L. 320

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We do not impute fraud to the Appellant, but we say he has not fulfilled the obligation imposed on him: *Barnard* v. *Hunter* (1). In *Spenser* v. *Topham* (2) the transaction was upheld and a general rule laid down. But in that case there had been an auction, and the property had been bought in at £620, and after being offered to many people at a higher price was sold at £620, ample diligence having been used.

Mr. *W. W. Karslake*, in reply:—

Lord *Eldon* did not in *Gibson* v. *Jeyes* (3) regard it as impossible for a solicitor to deal with his client. There the client parted with consols, and the solicitor instead of buying an annuity for her gave her only his personal bond. But here there was security on the property itself as good as any other security: *In re Dagenham* (*Thames*) *Dock Company* (4). Miss *Porro* had no other means of buying an annuity, and she had made up her mind to that form of transaction and was desirous to conclude it and go to live at *Seville*. She would not have submitted to a medical inquiry into the state of her health.

In *Holman* v. *Loynes* (5) there was no inquiry. Here those who were about Miss *Porro* and who knew her, were aware of her wishes; and there would have been no demur about the annuity if she had been considered to be in bad health, as people would have been ready enough to buy the property for an annuity.

In *Spenser* v. *Topham* (6) the Master of the Rolls thought £100 not a difference sufficient to set aside the sale.

1874
June 23.

Their Lordships having heard the argument of Counsel on the appeal, and deliberated thereon, proceeded, on the 23rd of June, 1874, to deliver the following judgment on the merits:—

SIR MONTAGUE E. SMITH:—

The general nature of this information has been already stated. The Attorney-General made three sets of persons Defendants,

(1) 2 Jur. (N.S.) 1213.
(2) 22 Beav. 573. 2 Jur. N.S. 865
(3) 6 Ves. 266.
(4) Law Rep. 8 Ch. Ap. 1022.
(5) 4 De G. M. & G. 270; S. C. 18 Jur. 839.
(6) 22 Beav. 576. 2 Jur. N.S. 865-7

claiming adversely to each other, viz. (1) the Appellant, Mr. *Pisani*, who claimed the property as a purchaser from Miss *Porro*; (2) Mr. *Benaim*, who alleged that *Pisani* had bought as trustee for him; and (3) the Respondents, who claimed under a will made by the deceased lady in 1858. The original prayer of the information was that the deed of conveyance to *Pisani* should be declared void, and be delivered up to be cancelled; and that it be decreed that Miss *Porro* died without heirs and intestate: the Attorney-General alleging that the will of 1858 relied on by the Respondents was revoked by a subsequent will made in 1868, which, although disposing of personalty only, contained a clause revoking former wills. After the irregular amendment had been made, by which the Court obtained power, by consent, to declare the rights of the Defendants *inter se*, the further peculiarity occurred that the Attorney-General, when he had apparently abandoned the hope of establishing the Crown's title by escheat, continued to conduct the cause in the interest of the Respondents. This led to a very anomalous proceeding: for whereas in the information the Attorney-General alleged that the will of 1858, under which the Respondents claim, was revoked by the will of 1868, his utmost efforts were afterwards employed to shew that this latter will was obtained by the undue influence of *Pisani* and others when the testatrix was *in extremis*, and, therefore, was not a valid revocation of the former one. The result of the suit, thus distorted, was a decree, by which it was declared and ordered that the lands had not escheated to the Crown; that the deed of conveyance to the Appellant, *Pisani*, be delivered by him into Court to be cancelled; that *Benaim* had no title or interest; and, further, that the will of 1868 (the parties taking under it, it is to be observed, not being before the Court) was void and ought to be set aside, and that the will of 1858, under which the Respondents claim, was valid. The decree further ordered that the Appellant should account to the Respondents, and directed that he should pay the costs of the Respondents and of *Benaim*.

The Attorney-General, for the Crown, and *Benaim* have acquiesced in the decree; and in dealing with the present appeal, to which the Respondents, claiming under the will of 1858, and the

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Appellant are alone parties, the case may be considered as if the Respondents had brought a suit to impeach the Appellant's conveyance. This deed bears date the 25th of January, 1868, and is a conveyance in fee of the property from Miss *Porro* to the Appellant, in consideration of the payment of an annuity of $125 per month, *i.e.*, $1500 per annum.

Two principal questions arise in the appeal, (1), whether the conveyance can stand, and, (2), whether, if not, the will of 1858 was revoked. But in the view their Lordships take of the first of these questions, it will not be necessary to consider the last.

The case of the Respondents to impeach the conveyance is, that *Pisani*, who is a barrister, and practises also, as is usual in *Gibraltar*, as an attorney, was the legal adviser of Miss *Porro*, and that having purchased whilst he was such adviser, he has not discharged the burden, cast upon him by that relation, of shewing that the bargain was the best that could be made for his client.

It appears, from the evidence, that the property in question was devised by the father of Miss *Porro*, who died in 1855, to his widow and six children; and that Miss *Porro*, in consequence of the deaths of the other devisees, claimed to be the sole owner of it. No doubt seems to rest on the deaths of any of the devisees, except one brother, *José*. This *José* left *Gibraltar* about thirty-three years before the transaction in question, and from letters which Miss *Porro* received soon afterwards she believed he had been murdered near *Madrid*. Nothing more appears to have been heard or known of him.

Miss *Porro* was about fifty-nine years of age at the time of the conveyance. The property was held in fee simple, and consisted of a large house and other buildings. There is abundant evidence that the house was in a dilapidated condition, and required a large outlay to put and keep it in repair. It was let to poor tenants and to women of bad character, and the rents were varying and precarious. A lease was put in, dated December, 1866, by which a part of the house was let to a man named *Benaluz* for three years at $36 a month. It contained the significant condition that, in the event of the Government or the police opposing the residence of prostitutes in the house, the contract might be avoided by the lessee. It is not to be wondered at that a lady should be

desirous of getting rid of this troublesome and disreputable property. Accordingly, we find that she had, during many years, made efforts to do so, and had made up her mind to dispose of it for an annuity.

An unimpeachable witness, M. *Lepri*, one of the Respondents, and trustee of the will of 1858, says that Miss *Porro* offered the property to him before 1858 for an annuity of $60 a-month. He refused the offer, and, it is important to observe, the reason given for his refusal is that he did not know what had become of the brother *José*. He also says the house was inhabited "by a loose and disreputable class of tenants." In 1867 Miss *Porro* proposed to sell the property for an annuity to Mr. *E. Recano*, who refused to buy. It appears from M. *Lepri's* evidence that, hearing of her renewed attempts to get an annuity, he applied to Miss *Porro* on behalf of Mr. *Shakery*, the father of the infant devisees under the will of 1858, and she then offered to sell the property to *Shakery* for an annuity of $100 per month. M. *Lepri* says he told *Shakery* of Miss *Porro's* offer, who replied that he would give $90 a month, "but should require some time to consult about it, and to see into the difficulty which might arise from her brother *Jose's* rights." Mr. *Shakery* might therefore, if he had chosen, have had the property for $100 per month, but he declined it, raising a difficulty about the brother *José*. The fact must then have been plain to him which, from all the evidence in the case is beyond dispute, that Miss *Porro* had a fixed intention to part with the property for an annuity, the effect of which would, of course, be to defeat the will she had made in 1858 in favour of his children.

Besides her desire to get rid of a troublesome and disreputable property, and to increase her income by an annuity, Miss *Porro* was anxious to do so speedily, as she wished to leave *Gibraltar*. Her intimate friend Madame *Suarez* says she wanted to finish the business of the house, so that she might go to live at *Seville*.

Their Lordships will now pass to two transactions which immediately preceded the sale to *Pisani*, and are, indeed, connected with it, viz. the abortive sales to *Larios* and *Bergel*. Before doing so, it is necessary to notice that Miss *Porro* had employed for eighteen years M. *Gonzalez* (whose description is not given, but who appears to have been a man accustomed to business) to

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manage her property. She spoke of him as "her confidential adviser." Other persons, and among them *Belilo* and *Benoliel*, were also engaged in the endeavour to sell the property for an annuity.

In December, 1867, Miss *Porro* agreed to sell to *Larios*, for an annuity of $1560. The bargain was arranged by *Gonzalez*, and the conditions of sale prepared by him. M. *Recano*, a barrister, was employed to prepare the deeds, which were, in fact, executed by *Larios*. It seems that Miss *Porro* felt some doubt respecting the transaction, and sent for Mr. *Pisani* to come to her at the *Spanish Hotel*, where she was living. This is the first occasion on which they met. In this interview *Pisani*, who was a nephew of *Larios*, was consulted as to the correctness of the deeds, and he then told Miss *Porro* there was some question as to the state of *Larios'* mind, and suggested a medical certificate. *Gonzalez* afterwards called on *Pisani*, and told him there was difficulty in obtaining such a certificate. *Pisani* then suggested that the two sons of *Larios* should execute a deed of guarantee to secure the annuity. Such a deed was accordingly prepared, not by *Pisani*, but by *Recano*, on instructions from *Gonzalez*. The sons, however, refused to sign it, and the matter ended. No imputation was made at their Lordships' Bar upon *Pisani*, for the advice he gave on this occasion, nor was there any attempt to shew that what he stated with regard to *Larios* was not warranted by the fact.

A week or two after the sale to *Larios* had gone off, Miss *Porro* sent for *Belilo*, and it appears that she wished him to find another purchaser. She told him she would not sell for less than she had agreed with *Larios*, viz. an annuity of $1560. *Belilo* gave the particulars to Mr. *Bergel*, a man of position and wealth, and entered upon a negotiation with him. After looking over the property, *Bergel* made an offer of $1400. It was communicated to Miss *Porro*, who refused it; and *Bergel*, after an interval of a week or ten days, increased his offer to $1500. During this treaty, *Pisani* was spoken to, it would seem, in the first instance, by *Belilo*, and saw both Miss *Porro* and *Bergel* on the subject of the sale. It appears that he so far recommended her to accept *Bergel's* terms that he told her he thought $1500 from a man like *Bergel* preferable to $1560 from *Larios*. Miss *Porro* ultimately agreed to

accept *Bergel's* offer, provided she was kept free of all legal and other expenses in the sale. This was assented to by *Bergel*, subject to a good title being made out, and he agreed to give *Pisani* $150 for preparing the deeds. *Pisani* prepared the conveyance, but before executing it, *Bergel* required to be satisfied about the brother *José*, and whether there was proof of his death. *Pisani* told him the circumstances, and what Miss *Porro* knew and believed; insisted there could be no doubt of *José's* death, and urged the acceptance of the title. *Bergel*, after consulting another lawyer, Mr. *Stokes*, refused to complete the purchase, because, to use his own words, the title did not suit him. *Pisani*, according to the testimony of Mr. *Bergel* and other witnesses, was very angry at this refusal. His charges, amounting to about $50, were paid by *Bergel*. Their Lordships see no reason to doubt that *Pisani* acted in perfect good faith throughout this transaction with *Bergel*.

Upon the refusal of *Bergel*, *Pisani* proposed to *Belilo*, and afterwards to Miss *Porro* herself, that he and his brother should purchase on the same terms *Bergel* had agreed to. Miss *Porro* assented to this proposal, and afterwards, on his brother refusing to join in the purchase, she agreed to sell to *Pisani* alone. Accordingly, he prepared deeds of conveyance, which he left with Miss *Porro*, suggesting that she should get another professional man to peruse them. She, however, consulted *Gonzalez* about them, who advised that clauses should be inserted to the effect that *Pisani* should keep the premises in repair, and make no alteration in them in Miss *Porro's* lifetime without her consent, and that if the annuity should be in default for twelve months he should forfeit what he had previously paid on account of it. These suggestions appear to their Lordships to have been fairly carried into effect by the deed, which provides that, upon default as above, the moneys already paid shall be forfeited, and the estate reconveyed.

Benaim's claim arose as follows: After Miss *Porro* had agreed to sell to *Pisani*, *Belilo* mentioned to *Pisani* that *Benoliel* had told him that *Benaim* wished to purchase. *Pisani* thereupon went to *Benaim* and asked if he would do so at the price for which it had been sold to *Bergel*. *Benaim* asked for time to consider, and *Pisani* gave him until the evening. There is conflicting evidence as to this negotiation. But it is evident that *Benaim* himself saw

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Miss *Porro*, and that she declined to accept him as a purchaser, giving as her reason that she had already sold to *Pisani*. She afterwards told *Gonzalez* that she would never sell to *Benaim* because he was not a man of responsibility. The Court below has declared, and, in their Lordships' opinion, rightly, that *Benaim's* claim has no foundation in law or in equity.

Much minute inquiry took place at the hearing as to Miss *Porro's* health, which it is sometimes difficult to follow. The summary of it may be found in some general opinions given by the medical witnesses. Dr. *Patron*, who had attended her professionally for ten or twelve years, says this: "Miss *Porro* had a delicate constitution, and was of a highly nervous temperament. She had tolerable health; she was always complaining, but I never attended her for any serious disease until her last illness. I have not attended her for any chronic disease. . . . I was sometimes called in to attend her during colds or nervous attacks, which lasted seven or eight days, but never for any serious illness. Dr. *Patron* had been pressed in cross-examination by the Attorney-General as to her chances of life. On re-examination, he thus explains:—"I have stated that Miss *Porro* might live for years or die next day; but, in reply to your question whether she had to my knowledge any disease which would prevent her living for years, I have stated that she was nervously constituted, and I have stated that she was healthy, and she might be both at the same time." He adds, persons of such a constitution are more liable to disease, and to complications when they are ill.

It appears she suffered at times from an affection of the throat, and Dr. *Hauser*, who examined it, states: "There was no hoarseness—no pain at all, but a sensation of tickling. I considered it not serious, but a very common complaint in this country arising from the climate."

There is no doubt that, during the attempts to obtain the annuity, representations were made to *Bergel* and others by Miss *Porro's* agents, that her health was in an unsatisfactory state, and that the bargain would be a good one. This was said to enhance the annuity, but it does not seem to have obtained credit. On the contrary, there were persons who took an opposite view. Mr. *Stokes*, a surgeon, who had been in the habit of meeting Miss

Porro at the houses of friends and in public places, deposed to having seen her a month after the transaction, in the streets, and at a ball at the theatre, when she appeared in a perfect state of health. He says she used to consult him as a friend, and seldom met him without asking him some question relative to the state of her stomach or her diet. He thought her complaints were imaginary and of a trifling nature, and that she took a great deal of care of herself. Mr. *Stokes* says that, knowing the property, and having a good opinion of the lady's chance of long life, he dissuaded *Pisani's* brother from joining him in the purchase. It appears, also, that *Bergel*, during his treaty, consulted Dr. *Patron* about the lady's health, who told him she might live ten or fifteen years, or might die in a short time; and that, if he wished to make a good calculation, he might reckon the period of her life as ten years.

Miss *Porro* died on the 26th of March, 1868, from pyæmia, which followed upon an abscess on the arm. The abscess came on suddenly. Dr. *Patron* was called in on the 4th of March. He then considered it trifling, and everything went on well until the 17th, when, he says, she got a chill. It may be collected from Dr. *Patron's* evidence that the abscess came on suddenly, and was not connected with any previous disease, but that Miss *Porro's* constitutional temperament rendered her more than ordinarily liable to pyæmia.

The case originally made by the information was that *Pisani* knowing or having reason to believe that Miss *Porro* was suffering from a disease tending materially to shorten life, made fraudulent representations to *Benaim* to induce him to decline to purchase, and that he fraudulently represented to Miss *Porro* that *Benaim* had so declined, and that no other person would purchase for an annuity of $1500, and by these means obtained the conveyance to himself. The Counsel for the Respondents, Mr. *Fry*, detached himself, to use his own phrase, from the case of the Attorney-General. He absolved *Pisani* from the charge of conscious fraud, and admitted that there was no evidence to support the imputation that he acted in the belief that Miss *Porro* was suffering from disease likely to shorten her life. The learned Counsel rested his case entirely on *Pisani's* relation of attorney to Miss *Porro*, and

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on the principles acted on by Courts of Equity when that relation exists.

Several decisions on this subject were referred to. It results from them that the Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of shewing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser.

The principle is thus stated by Lord *Eldon* in *Gibson* v. *Jeyes* (1): "An attorney buying from his client can never support it unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger; that must be the rule. If it appears that in that bargain he has got an advantage, which with due diligence he would have prevented another person from getting, a contract under such circumstances shall not stand."

The doctrine of the Court is stated much in the same way by Lord Chancellor *Cranworth*, in *Savery* v. *King* (2). The Lord Chancellor says:—"Where a solicitor purchases or obtains a benefit from a client, a Court of Equity expects him to be able to shew that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess; and that the solicitor has done as much to protect his client's interest as he would have done in the case of the client dealing with a stranger."

The Counsel for the Respondents insisted that, in applying these rules to the case of a purchase from a client in consideration of an annuity, the utmost care should be taken by the attorney before entering into it; and especially that it was his duty to point out other modes of sale which might be more advantageous, and to ascertain accurately the value of the client's life, and the state of the property to be sold, and he strongly relied on the observations of Lord Justice *Turner*, in the case of *Holman* v. *Loynes* (3). Their Lordships have no doubt that, as a rule, this would be the duty of the attorney; but every case must be decided on its own

(1) 6 Ves. 271. (2) 5 H. L. C. 655. (3) 4 M. & G. 278.

circumstances, and they think there are grounds for holding that the advice and investigation referred to were not called for in the peculiar circumstances of the present sale.

In the first place, Mr. *Pisani* was not the general or confidential adviser of Miss *Porro*. He was called in as a stranger, for the first time, to advise her on the sufficiency of the deeds upon the sale to *Larios*, all the conditions of which had been before settled under other advice. The further security he suggested was even then prepared by *Recano*. He intervened in the treaty for the sale to *Bergel*, without apparently having been employed by Miss *Porro* to obtain a purchaser. But no doubt he did interpose in that treaty, and became the attorney of both parties in preparing the deeds and completing the purchase. This was the extent of his employment on behalf of Miss *Porro*, except in a small unexplained matter relating to a distress.

In a case where a solicitor, employed by a woman to procure an advance upon an annuity to which she was entitled, took a transfer of it to himself, of a kind which raised a doubt whether it was a sale or a mortgage, and no other solicitor was employed, the woman brought a suit to set aside the transaction:—Lord Justice *Knight Bruce*, in giving judgment, said, "He could not view the case as one between solicitor and client. It happened, it was true, that one of the parties was a solicitor, and the other of them had no legal advice except from that solicitor; but there had existed no previous relation of solicitor and client between them, and therefore that confidence which was the basis of the rule of the Court in similar cases did not appear to have existed, and he could not consider the case came within it." Lord Justice *Turner* took the same view: *Edwards* v. *Williams* (1).

Their Lordships do not go the length of that case in the present. They think that the relation of solicitor and client existed, so far as to make it necessary for *Pisani* to shew that the bargain he made with Miss *Porro* was a fair one; but in dealing with the facts, the circumstances of the employment may be considered, and the amount of influence estimated; and they find no reason to suppose that, in this case, a high degree of confidence existed, or that much influence had been acquired.

(1) 32 L. J. (Ch.) 763.

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Upon the general facts it is indisputable that Miss *Porro* had, for a long time before *Pisani* was called in, and upon other advice, resolved to sell the property for an annuity; this was a natural desire, for she wanted to increase her income, and had no relations. She had made proposals to friends and strangers, and had actually sold the property to *Larios* in this way, after consultation with her confidential adviser, *Gonzalez*, and after having had an opportunity of consulting Mr. *Recano*. Under these circumstances their Lordships cannot think that *Pisani* was guilty of any breach of duty in not suggesting to her other modes of disposing of the property.

Then as to the terms of the sale in question. It was said on *Pisani's* behalf that he did no more than take up the bargain which *Bergel* had abandoned. This is really what occurred, but the onus still lies upon him to shew that the bargain was a fair one, and the more as on the treaty with *Bergel* he had himself proposed to Miss *Porro* the abatement of the annuity from $1560 to $1500. Their Lordships have thought it right carefully to examine the evidence relating to this treaty, for, unless there was perfect *bona fides* on the part of *Pisani* in the transaction with *Bergel*, it would have been impossible to sustain his own subsequent purchase. They are, however, on a review of it, satisfied that he acted with good faith; that, in proposing to Miss *Porro* to accept the offer of $1500, he had reason to think it was as much as could be obtained from *Bergel* or any other eligible purchaser; and that he did all in his power to induce *Bergel* to complete the purchase.

But *bona fides* alone would not be sufficient, for *Pisani*, having taken *Bergel's* bargain, is bound to shew that it was, in fact, a fair one, and that he has not lost, for want of due diligence, better terms for his client.

On the question of value, the dilapidated nature of the property and the disreputable character of the tenants, the fact the annuity had been hawked in *Gibraltar* for many years, and refused even at a lower rate by those who knew all the circumstances; and the cloud which rested on the title, from the uncertainty as to *José's* death, which had been made an objection, whether well or ill founded, by *Lepri* and *Shakery*, must be borne in mind as circumstances likely to depreciate the marketable value of the property.

When, with a knowledge of all these circumstances, and under the advice of her confidential agent, *Gonzalez*, Miss *Porro* sold the property to *Larios* for an annuity of $1560, it may reasonably be presumed that this was the highest offer that could be obtained. Some evidence was given of the rents, outgoings, and repairs, and of the value of the property; but it does not furnish an inference that the sale to *Larios* was not for the largest annuity that could be obtained.

Then, as to the duty of *Pisani* when originally called in, and when he took part in negotiating the treaty with *Bergel*. Undoubtedly, if the sale for an annuity had been a new matter, it would have been his duty to suggest inquiries as to the value of Miss *Porro's* life, and the state and value of the property. But their Lordships cannot say that, when consulted at this late period, there was any want of due diligence in his regarding the sale to *Larios*, made with the advice of *Gonzalez* and *Recano*, as representing the value, and in not advising new inquiries, which would have involved further expense and delay.

The sale to *Bergel* became also an accomplished fact; and if *Bergel* had not thrown up the bargain, the property would have passed to him irrevocably for the annuity of $1500. That sale which, for the reasons already given, their Lordships think was properly and *bonâ fide* concluded, became, in its turn, a criterion of the value which could then be obtained.

If, then, fresh inquiries as to value need not have been made upon the treaty with *Bergel*, none were necessary when that sale went off, and another purchaser had to be found; and if there would have been no want of due diligence in selling to another at the price *Bergel* had agreed to give without making them, neither would there be any when Miss *Porro* agreed that *Pisani* himself, instead of a stranger, should step into *Bergel's* contract. His proposal was no doubt precipitate, and if there had been reason to believe that by such further delay as Miss *Porro* would have acquiesced in, and by further offers to others, more might have been obtained, this sale could not stand. But the evidence does not point to such a conclusion. On the contrary, after all that had occurred in the previous endeavours to sell the property, and the recent refusals of *Larios* and *Bergel* to complete,

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it is not improbable that any further hawking of the property would have depreciated its selling value.

It was urged that one of the motives for Miss *Porro's* readiness to accept $1500 from *Bergel* was that he was a wealthy man, from whom payment of the annuity would be safe, and it was suggested that *Pisani* was not wealthy. There is no evidence to support this suggestion, and Mr. *Pisani*, although subjected to very severe cross-examination, was not asked as to his means. His competency in this respect may therefore be reasonably assumed, and it is to be observed that, by the provisions inserted in *Pisani's* conveyance, and which were not in *Bergel's*, the property itself is made a security for the due payment of the annuity.

On the whole, their Lordships think that, having regard to the nature of Mr. *Pisani's* employment, he would not have been chargeable with want of due diligence if the sale had been on the same terms to a third person, instead of to himself; and they further think that, under the special circumstances of the case, it appears with reasonable certainty that a higher annuity could not have been obtained from an eligible purchaser. The case, therefore, for setting aside the conveyance, in their opinion, fails.

Although their Lordships have come to this conclusion, they feel constrained to say that there is much in the transaction which cannot be approved of. They think Mr. *Pisani* would have better consulted his position as a barrister if he had been less precipitate in taking up the bargain, and if, instead of only suggesting, he had insisted on the intervention of another professional man. He ought not to be surprised that when Miss *Porro* died, although from causes which could not have been foreseen, a cloud of suspicion should rest on the transaction, and that an inquiry into it should be instituted. He must, therefore, bear his own costs of the suit and of this appeal.

In the view their Lordships have taken of the case, it becomes immaterial to consider the circumstances under which the will of 1868 was made, and its effect upon the prior will. The Respondent's counsel intimated that they did not consider these circumstances had any material bearing upon the question of the validity of the purchase. It is, therefore, unnecessary to refer to them, and it would be improper, without necessity, to do so, as the per-

sons who take benefits under the will of 1868 have not been made parties to the suit.

Their Lordships, in conclusion, cannot but express their regret that, when the title of the Crown failed, the information was not dismissed, and the Defendants left to establish their rights as against each other in the ordinary way. The irregular procedure introduced by the amendment, and the continued intervention of the Attorney-General, must have caused to the Court below, as they have to their Lordships, great embarrassment. They have, moreover, led to a decree declaring that the will of 1868 should be set aside, although the parties claiming under it were not before the Court; and to a direction that *Pisani* should pay *Benaim's* costs, although the same decree declares that *Benaim* had no title in law or in equity. The decree in these respects cannot, in any view of the case, be supported.

In the result their Lordships will humbly advise Her Majesty that the decree under appeal, except so much thereof as orders and declares that the hereditaments and premises referred to in the information have not escheated to the Crown, and so much thereof as orders and declares that *Benaim* has no title to, or interest in, the said hereditaments and premises, be reversed; and that it be further declared that none of the parties to the said information are entitled to have the said conveyance of the 25th of January, 1868, delivered up to be cancelled.

There will be no costs of the appeal.

Solicitor for the Appellant: *James Crowdy.*

Solicitors for the Respondents *Lepri* and *Shakery*: *Vallance & Vallance.*

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COUNT GIO. FRANCESCO SANT, BARON CASSIA . . . . . } APPELLANT;

AND

THE COUNTESS GENEROSA, THE WIFE OF COUNT SANT . . . . . } RESPONDENT.

ON APPEAL FROM THE APPELLATE COURT OF THE ISLAND OF MALTA.

Judicial Separation—Maltese Law—Ill Treatment of Child equivalent to ill Treatment of Parent.

Under the words "*ingiurie gravi*," in the 46th Article of the Maltese law relating to the separation of married persons, it was intended to leave a large discretion to the tribunal having to judge of the facts. Not only acts but words designed to wound the feelings of the wife may amount to "*ingiurie gravi*," and in considering whether they do so, the position of the parties and the habits and usages of the society in which they live must be regarded. Insults offered to the wife which manifest contempt of her in that character are of special gravity, especially if offered in the presence of others; and wrongs of this description are not to be estimated separately, but in combination one with another.

Where a husband habitually treated his wife with harshness and insult, and thereby kept her in a constant state of excitement and fear, and also, upon a trifling pretext, used personal violence to their adult daughter, by which her health was affected during several months:—

Held, that the violence offered to the daughter must be taken in conjunction with the previous treatment of the mother, and that together they constituted "*ingiurie gravi*" within the meaning of the 46th Article.

Where a father ill-treated his daughter in such a manner as to afford to his wife a ground, under the Maltese law, for demanding separation from him, but the wife remained in his house for several months, during which the daughter continued to suffer from the consequences of the ill treatment, and required the attention of her mother; and the wife quitted her husband's house on the first occasion of his leaving home:—

Held, that the matrimonial offences of the husband had not been condoned.

THIS was an appeal from a judgment of the Appellate Court at *Malta*, confirming in substance the decision of the First Hall of the Civil Court, in a suit instituted by the Respondent the Countess *Sant* against her husband Count *Sant*, praying for a

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR JAMES HANNEN.

judicial separation on the ground of ill treatment. The First Hall gave judgment in favour of the Countess.

The proceedings are founded on the 46th Article of Ordinance No. 5 of 1867, "to amend the Laws relative to the Rights and Duties emanating from Marriage and to Separation of Married Persons."

That Article is in these terms:—

"Art, 46. *Ciascuno dei conjugi può domandare la separazione per eccessi, sevizie, minacce, o ingiurie gravi dell' altro contro l'attore medesimo o contro qualunque dei suoi figli.*"

The corresponding Article of the Italian "*Codice Civile*," which became law on the 1st of January, 1866, is as follows:—

Art. 150. "*La separazione può essere domandata per causa di eccessi, sevizie, minacce e ingiurie gravi.*"

This provision is derived from the French *Code Civil*:—

Art. 231. "*Les époux pourront réciproquement demander* le divorce [for which must now be substituted "*séparation de corps*"] *pour excès, sévices, ou injures graves de l'un d'eux envers l'autre.*"

The Respondent had left her husband's roof before she instituted the proceedings for a separation. The harsh treatment complained of by her was chiefly directed against herself, but it also consisted in part of ill usage by the Appellant of one of their daughters, which threw her into a state of bad health which lasted for several months.

The facts are fully stated in the judgment of their Lordships.

The appeal now came on to be heard.

Mr. *Benjamin*, Q.C., and Mr. *W. F. Phillimore*, for the Appellant, contended that the ill usage of the daughter, if it was such as to constitute a ground for separation, had been condoned by the mother's continued residence in her husband's house, and that apart from such ill usage the facts proved in the case did not bring it within the English definition of cruelty, nor the 46th Article of the Ordinance.

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Dr. *Deane*, Q.C., and Mr. *F. W. Gibbs*, for the Respondent, contended that she had been compelled by her daughter's ill health to remain in her husband's house, and that she had in fact taken the first opportunity to leave it; and, supposing the facts not to come within the English definition of cruelty, still that the evidence presented a case to which the 46th Ordinance applied.

Mr. *Benjamin*, Q.C., in reply.

The following authorities were referred to:—*Demolombe, Cours de Code Napoléon*, liv. i., tit. vi., ch. i., tom. iv., pp. 477–480 [ed. 1861]; *Duranton, Cours de Droit Français* [A.D. 1834], tom. i., pl. 549; *Toullier, Droit Civil Français* [ed. 5], tom. ii., pl. 756; *Zachariæ, Droit Civil Français* [A.D. 1854], tom. i., pl. 138, 153; *Codice Civile Italiano Annotato; Cattaneo e Borda*, art. 150; *Evans* v. *Evans* (1); *Kelly* v. *Kelly* (2); *Milner* v. *Milner* (3).

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Their Lordships reserved their judgment, which was now delivered by

SIR JAMES HANNEN:—

[His Lordship, after stating the terms of the Maltese Ordinance and of the Italian and the French Codes, proceeded as follows:—]

It is to be observed that an important addition has been made in the Maltese Ordinance to the provisions of the Italian and French laws, by placing wrongs done to the children of the Plaintiff on the same footing as those inflicted on the Plaintiff.

This addition was probably suggested by those cases in which, under the English law, cruelty to the children in the presence of the wife has been held to be cruelty to her (4); but the law of *Malta* cannot be interpreted by that of *England*, for they differ in this important respect, that by the latter the ill treatment which can give cause for the judicial separation must amount to cruelty ("*sævitia*"), while by the former, separation is accorded not only

(1) 1 Hagg. Cons. R. 35.
(2) Law Rep. 2 P. & D. 59.
(3) 4 Sw. & Tr. 240.
(4) *Bramwell* v. *Bramwell* (3 Hag. Cons. 637; *Suggate* v. *Suggate* (1 Sw. & Tr. 491); *Wallscourt* v. *Wallscourt* (5 N. of C. 132).

for conduct which would fall within the definition of cruelty, but also for "*ingiurie gravi*" (grievous wrongs) done to the complaining consort. It is true that by judicial interpretation an extension has been given in *England* to the meaning of the word "cruelty" which would possibly include some of those cases which would, under the Maltese law, fall within the description of "*ingiurie gravi*;" for instance, it has been said by more than one Judge, that spitting on the wife amounts to cruelty (*D'Aguilar* v. *D'Aguilar* (1), *Saunders* v. *Saunders* (2)); and it has been held, where a husband by his filthy language and conduct led a passer-by to take the wife for a common prostitute and insult her, that this amounted to cruelty (*Milner* v. *Milner* (3)). But the meaning of the words used in the Maltese Ordinance cannot be limited by reference to the English decisions, and we are called upon in this instance, by the language of the Ordinance, to distinguish between acts of violence which are included in the expressions "*eccessi*" and "*sevizie*," and those moral wrongs which are pointed at by the words "*ingiurie gravi*."

To assist in this investigation reference was properly made in the argument of this case, to Italian and French commentators on their respective Codes. To these may be added *Dalloz*, "*Répertoire de Jurisprudence*," tit. "*Séparation de Corps et Biens*," § 28:—

"*L'injure, pour devenir cause de séparation, doit être grave; elle doit porter atteinte à l'honneur de l'époux contre lequel elle est dirigée. Ici, comme pour le cas de sévices, il est difficile d'en déterminer les caractères particuliers; tout dépend de la condition, de la manière de vivre des parties intéressées. Telle parole est une injure grave pour la femme qui appartient à une classe où l'éducation aiguise la sensibilité, qui ne serait qu'un mot sans importance dans une classe où les expressions ont en général beaucoup moins de convenance et de mesure.*

"*Des paroles amères, des expressions de mépris ou de dégoût constituent un outrage susceptible de fonder une demande en séparation.*

"*Au reste, cette identité des outrages de fait aux outrages de vive*

(1) 1 Hag. Cons. 776. (2) 1 Rob. Ecc. 562.
(3) 4 Sw. & Tr. 240.

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voix, des peines aux injures, n'a jamais semblé à personne la matière d'une incertitude."

In proof of which he cites various authors, and proceeds:—

"La seule difficulté est de bien distinguer les faits qui doivent être considérés comme injurieux, et l'on peut, ce nous semble, la résoudre à l'aide d'une théorie assez simple. L'injure procède nécessairement du mépris ou de l'intention de manifester ce sentiment: les faits qui n'en sont pas empreints peuvent bien révéler l'oubli d'un devoir, mais à notre sens ce ne sont pas des injures. Toutefois, il ne faut pas, à l'égard des époux, entendre le mot mépris dans le sens restreint du langage ordinaire. Placés par la loi et par la religion dans des rapports d'affection profonde et de confiance intime qui doivent vivement exciter leur sensibilité, ils ne sauraient sans injustice subir, sous ce rapport, l'application banale d'un vocabulaire qui n'est pas celui de la société conjugale. Il y a mépris, et par suite injure, de la part d'un des époux envers l'autre, lorsqu'il y a manifestation affectée, persévérante, d'un sentiment contraire à celui qu'il devrait éprouver pour son conjoint."

Their Lordships consider that, under the words "*ingiurie gravi*," it was intended to leave a large discretion to the tribunal having to judge of the facts; that not only acts but words designed to wound the feelings of the wife—where, as in this case, she is the complaining party—may amount to "*ingiurie gravi*;" that, in considering this question, the position of the parties, the habits and usages of the society in which they live, must be regarded; that insults offered to the wife, which manifest contempt of her in that character, are of special gravity, and that that gravity is increased if the insults be offered in the presence of others; that wrongs of this description are not to be estimated separately, but in combination one with another.

Having considered the principles applicable to the case, the facts may be briefly stated as follows:—

The parties were married on the 31st of August, 1830, and have had five children. They were both of high rank, the Appellant being noble, and the lady of equal birth. They appear to have been in somewhat straitened circumstances for their position in society.

There is nothing in the evidence to shew that their early married life was not happy; and all the witnesses who were called to establish the charge of cruelty against the Count speak chiefly as to events of the four or five years preceding the separation.

One witness (*Nicola Ferrugia*) called by the Count gave evidence from which it would appear that, as long ago as 1849, the Appellant used threatening and insulting language towards his wife: "One day the Count, taking a plate in his hand, said to the Countess, threatening her, 'If you speak, I will break your head with this plate. Your income is not enough for your slippers.'" But, whether this be regarded as an isolated outburst of temper or as indicative of his habitual behaviour, it appears from the general tenor of the evidence of the witnesses called on behalf of the Countess, that the conduct of her husband towards her, and one at least of her children, had assumed a more serious character about the year 1866: "Once, four or five years ago," says the witness *Elena Bonatto*, in her examination taken in May, 1870, "I approached Miss *Angelica*, and, finding her crying, she told me that she had got a slap in the face."

Lorenzo Vella, coachman to the Count's father, speaking of the general behaviour of the Count when he came with his family to visit his father during the nine years which preceded 1864, says, "When the Count came, he got angry with every one, also with his father. The Count *Francesco* used to threaten every one. There was no reason for it. He used to call the wife and children 'carrion,' but not his father. He spoke so whilst irritated, because everything irritated him."

Maria Bonello, also in the service of the Count's father, says, "When he came he scolded the lady. Once, five years ago, the Count came about 10 P.M. I heard him cry out. I heard from his lady, who was crying, that he was scolding her because she had gone out to church. He continued scolding till about midnight, and returned to town at night-time."

The principal evidence offered on behalf of the Countess is that of servants living in the house.

Lorenzo Camilleri, who lived eleven years in the family, says, "The lady was treated badly; he swore at the lady, and at the children also, in a passion. There was no cause for the anger. I

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sought to get away, not to hear the bad words. The last quarrel took place about two years or twenty months ago (*i.e.*, in 1868). The Count had said, 'It will end badly, we shall finish badly;' and sometimes he said, 'On account of yourselves I shall go to the gallows.'"

He also states that the Count, in the presence of his family, used profane language in depreciation of matrimony, and continued, "Some months before I left the Count's house I heard him say, 'I raised you from the mud, your income does not serve me for tooth-picks.' Oftentimes I have seen the wife in tears, also the children. When the Count knocked at the door the family got timid. The Count at times used the word 'carrion' (*carogna*) to his wife."

He also states that the Count used to apply a grossly obscene term of abuse to his wife.

Elena Bonatto, more than nine years a servant of the parties, states that the Count used towards the lady the expression "carrion," that he threatened in gross terms to kick her, that he threatened to turn her out of the house, that sometimes the reason was some mistake of the witness herself in serving the dinner, that the Countess was often weeping, that the Count cursed and swore and used improper words before the children, as well as before their mother, and particularly that he used with reference to his wife, and in her presence, language of the most disgusting indecency, too gross to be here repeated.

Margarita Ferrugia, a servant in the house for two years and a half before the Countess left, deposed that the Count threatened to kick his wife, and to throw her out of the window; and on one occasion, when the lady was in bed, he threatened to throw her out with her chemise on, and to kill her; that after this, from 3 o'clock in the morning till 6, he took to walking about, swearing, cursing, and grumbling, from the lady's room to his own. "At last he remained in his room." "During my stay," the witness continues, "their house was a hell. He used to say to the lady she was good for nothing; that he had raised her from the dirt. He swore by the Virgin Mary. A day did not pass without some quarrel. He used to say that he would be sent to the gallows on her account."

This witness also corroborated the last as to the use by the Count of the obscene and insulting language to the Countess already referred to. "He did not call her by her name, but would say, 'I say, come here,' and call her a sow and brood-hen. These words he used openly at dinner before the children and servants."

No suggestion of a reason was offered why these witnesses should not be believed, except the antecedent improbability that a gentleman should be guilty of such conduct to his wife; but the length of time they were in the service of the Count is a testimony to the general goodness of their character, and no questions were put to them in cross-examination with a view of shaking their credibility.

On the other hand, their statements were corroborated in some important particulars by the evidence of Dr. *Mifsud*, the medical attendant of the family. He says, "I observed that he, the Count, is of a hard disposition. The father is of an irascible character, in consequence whereof, when he is under some impulse, he does not pay any respect to the state of illness of the wife and of the family. If at any time some family dispute arises with the servants, or something similar, he gets into a passion and utters some injurious word even in the sick-room; words addressed to the servants and sometimes to the wife, momentarily aggravating the state of the sick person. For example, the words used were that the position of the wife depended on her title as Countess, and speaking with contempt of her family. I also heard him swearing as if using familiar expressions. The words were uttered in a loud voice audible to the family. I also attended the Count sometimes, but his irascibility surmounted his indisposition," probably meaning that his illness did not prevent his outbursts of temper. "I do not remember injurious words in the presence of the lady, but there were such words said to me in regard to her. I always observed the exasperated state of the Count. I told the Count to repress his irritation; he used to say, 'I cannot.'"

Their Lordships are of opinion that the evidence of these witnesses outweighs the testimony of those persons who were called on behalf of the Count.

Some of these, indeed, gave evidence rather tending to support the charges made against the Count. The evidence of *Nicola*

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Ferrugia has already been referred to. Another, *Camilleri*, had only been in the Count's service a month when the Countess left; but he, while stating that he saw no blows and heard no bad language, says that when the lady and family used to retire, the Count remained to grumble, and swore against those who had caused him to marry.

The other witnesses called by the Count were either men servants (such as the gamekeeper and coachman), not having the same opportunities of observing his behaviour as those called by the Countess, or acquaintances, before whom, on the rare occasions on which they saw him, it may well be that he restrained his passion, while in the privacy of his home he may have permitted it to carry him to the excesses deposed to by the domestic servants and Dr. *Mifsud*. Even if the weight of evidence on the one side and the other were more equally balanced than it is, their Lordships would not lightly set aside, on a question of fact, the finding of the tribunal which had an opportunity of hearing the witnesses and observing their demeanour; but without these advantages their Lordships think that the testimony of the witnesses deposing to what they saw and heard is of more value than that of persons who, from the necessity of the case, are only able to state that they did not see or hear similar conduct and words.

The result is, that their Lordships come to the conclusion that the Count, for some years before his wife left her home, had been accustomed to treat her with harshness and unkindness, and that he frequently insulted her in the grossest manner before her servants and children, and intentionally wounded her feelings as a mother and a woman by applying to her terms of the foulest vituperation, and that he thereby kept her in a constant state of excitement and fear, which could not but be prejudicial to her health.

This being the general condition of the household, it was proved, and not denied, that in November, 1868, the Count gave his daughter *Angelica*, a woman of thirty, some slaps in the face, he alleging that the only provocation she had given was that she contradicted him.

It was also proved by Dr. *Mifsud* that the effect of these blows, acting on the already delicate health of the daughter, was to throw

her into convulsions, which continued to return during several months, and that the lady and all the family from the time of this occurrence were in fear of the Count.

Their Lordships are of opinion that this violence offered to the daughter must be taken in conjunction with the previous treatment of the mother, and that together they constitute "*ingiurie gravi*" within the meaning of the 46th Article.

It was, however, argued that the Countess, by not leaving her husband before February, 1869, condoned his matrimonial offences. Their Lordships are of opinion, however, that this defence is not established. It appears that *Angelica* remained ill from the consequences of her father's violence for several months, during which she required the attention of her mother, and it further appears that on the first occasion of the Count leaving home the lady took advantage of the opportunity to escape from the house.

Their Lordships will, therefore, humbly recommend to Her Majesty that the judgment of the Court of Appeal of *Malta* of the 22nd of April, 1872, be affirmed, and that this appeal be dismissed with costs.

Solicitors for the Appellant: *Brooks, Tanner, & Jenkins.*
Solicitors for the Respondent: *Wilde, Wilde, Berger, & Moore.*

END OF VOL. V.

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ACCOUNTS, MODE OF KEEPING: *See* MORTGAGE.

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ADVANCES CHARGED TO MORTGAGE: *See* MORTGAGE.

ADMIRALTY COURT ACT, 1861: *See* ADMIRALTY JURISDICTION; SHIP AND SHIPPING. 2.

ADMIRALTY JURISDICTION: *See also* CERTIORARI.

1. —— By 32 & 33 Vict. c. 51, s. 2, it is enacted that "Any County Court appointed, or to be appointed, to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship . . . provided the amount claimed does not exceed £300:"—*Held*, that this section gives the County Court jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases. GAUDET *v.* BROWN. CARGO EX "ARGOS" - - 134

2. —— Where a Petition on Protest is filed on the ground of want of jurisdiction, before the Plaintiff's petition setting forth the particulars of his damage, the Petition on Protest ought to state the facts which shew want of jurisdiction.—The general words of clause 6 of the *Admiralty Court Act*, 1861, "any claim . . . for any breach of contract on the part of the owner, &c., of the ship" have relation to the contract in the bill of lading.—Where the parties contemplated that the goods would, or at least might, be carried into and delivered in an English port, and it was so provided by the bill of lading signed by the master at *Rangoon*, in pursuance of a charterparty made in *England*, and the master in fact put into an English port for orders in part fulfilment of the contract of carriage; the jurisdiction, at least in respect of then existing causes of suit, arose when the goods were so carried into port, and was not taken away by the ship being subsequently sent to a foreign port to be discharged.—

ADMIRALTY JURISDICTION—*continued.*

The 6th section of the *Admiralty Court Act*, 1861, does not confer a maritime lien. It only gives to the Court of Admiralty jurisdiction to entertain a suit either *in personam* or *in rem* by arrest of the ship whenever it comes within reach of process. The arrest cannot avail against any valid charge on the ship, nor against a *bonâ fide* purchaser.—The *Admiralty Courts Act*, 1861, being intended to remedy a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. DAPUETO *v.* WYLLIE. THE "PIEVE SUPERIORE" - - - 482

AGENT: *See also* COLONIAL LAW. 4; PRINCIPAL.

A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved; and there is no distinction between the case of fraud and the case of any other wrong.—Where one party has suffered, and another has profited by, the fraudulent representation of an agent of the latter made within the scope of his authority, the former is entitled to recover damages.—An action of deceit may be maintained against a company, whether incorporated or not incorporated, in respect of the fraud of its agent.—An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to *A.* which, by omitting a material fact, misled *A.*, and induced him to accept a bill in which the bank was interested; and *A.* was compelled to pay the bill:—*Held*, that *A.* could recover from the bank the amount so paid.—In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated for the purposes of pleading as that of the principal.—The case of *Western Bank of Scotland* v. *Addie* (Law Rep. 1 H. L., Sc. 145) distinguished from *Barwick* v. *English Joint Stock Bank* (Law Rep. 2 Ex. 259).—Dicta of Lord *Chelmsford* and Lord *Cranworth*, in the case of *Western Bank of Scotland* v. *Addie* observed upon. MACKAY *v.* COMMERCIAL BANK OF NEW BRUNSWICK - 394

AGREEMENT BETWEEN VENDOR AND PURCHASER, EFFECT OF,] that adjoining land "should never be hereafter sold, but left for the common benefit of both parties and their successors." McLean *v.* McKay - - - 327

ALIMENTARY ALLOWANCE: *See* Colonial Law. 2.

APPEAL: *See also* Appealable Amount; Certiorari; Consent; Practice. 2, 3; Waiver of Appeal.

The Supreme Court of the *Straits Settlement* having refused to grant leave to appeal to the Queen in Council, on the ground that it did not possess power to grant such leave, the Judicial Committee granted leave to appeal against the original decree, and also against the Order refusing leave to appeal. Neo *v.* Neo - - 89

APPEALABLE AMOUNT.] Under the *Code of Civil Procedure for Lower Canada* the appealable amount is £500 sterling, but an appeal is also permitted in cases of less value if they be "cases concerning titles to lands or tenements, annual rents, or other matters in which the rights in future of parties may be affected."—An annual rent of $11 28c. had been sold for $456, payable in ten equal yearly instalments, and the land was hypothecated to secure the amount.—In a suit to enforce payment of certain instalments, the Court of Queen's Bench in *Lower Canada* granted leave to appeal to Her Majesty in Council:—*Held*, that this case did not fall within the above description, and was not appealable. Sauvageau *v.* Gauthier - - - - - 494

APPREHENSION OF CAPTURE: *See* Ship and Shipping. 2.

ASSIGNMENT WITHOUT NOTICE: *See* Bill of Lading. 1.

ATTORNEY: *See* Purchase by Solicitor from Client.

BACK FREIGHT: *See* Ship and Shipping. 1.

BILL OF ENTRY.] The *Customs Regulations Act of* 1845, of the colony of *New South Wales*, enacts that the person entering any goods shall deliver to the collector a bill of the entry thereof, expressing the particulars of the quantity and quality of goods, and the packages containing the same, &c., and that the collector shall grant his warrant for the unlading of such goods; and that no entry shall be deemed valid unless the particulars of the goods and packages in such entry shall correspond with the report of the ship, and any goods taken or delivered out of any ship by virtue of any entry or warrant, not corresponding or agreeing as therein mentioned, or not properly describing the same, shall be deemed to be goods landed or taken without due entry thereof, and shall be forfeited,—The *Customs Duties Act* of 1871, which relates to *ad valorem* duties only, provides for the verification of the value at the time of entry by the production of the genuine invoice, and by a declaration in a prescribed form.—*A. & B.*, merchants, carrying on business together in *Sydney*, imported several cases which contained soft goods, and also contained portmanteaus wherein soft goods were packed. The agents of *A. & Co.* filed and delivered a bill of entry of the cases, and

BILL OF ENTRY—*continued.*

made the required declaration in verification, and produced the invoice of the soft goods; but in respect of the portmanteaus and hat-boxes he made no entry and filed no invoice.—It was *held*, by the Judicial Committee, that by the omission in the entry of the portmanteaus and hat-boxes contained in some of the cases the whole of the contents of such cases were forfeited, the entry of the goods being invalid. No entry can cover less than one entire package. Prince *v.* The Queen - - - - - - 1

BILL OF EXCHANGE: *See also* Agent; Mortgage.

A. drew a bill on *B.*, which *B.* accepted. *C.* became the holder for value.—Before due date it was agreed between *A.* and *C.* (*A.* assuring *C.* of *B.'s* concurrence) that the bill should be renewed; and *C.* gave to *A.* a cheque on *C.* for the amount of the bill, to the intent that *B.* should be placed in funds to meet the original bill, and should thereupon accept the renewed bill.—*A.* sent the new bill to *B.* for acceptance, and also sent him the cheque, and *B.* knew the purposes for which both were sent.—*B.* cashed the cheque and paid the first bill, but refused to accept the second:—*Held*, that *B.* had no right so to appropriate the cheque without accepting the bill:—*Held*, also, that the agreement between *A.* and *C.* did not release *B.* from his suretyship as acceptor of the first bill. Torrance *v.* Bank of British North America - - - - 246

BILL OF LADING: *See also* Ship and Shipping. 1.

1. —— *Semble*, a bill of lading, in which the words "or order or assigns" are omitted, is not a negotiable instrument.—Where goods have been delivered to the person to whom the bill of lading was made out, and they have then been delivered to indorsees of the bill of lading, so that the indorsees unite in themselves a legal and an equitable title to the goods, the omission of the words "or order or assigns" in the bill of lading is not sufficient to give the indorsees constructive notice of some equitable arrangement between the person to whom the bill of lading was made out and the consignors. Henderson *v.* Comptoir d'Escompte de Paris - - - - 253

2. —— *A.* a merchant in *London* and in *Hong Kong*, purchased goods for shipment from *B.*, and paid for them by his acceptance of *B.'s* draft against the shipment, on the terms that *A.* should send them to his firm at *Hong Kong*, and that the proceeds should be remitted to *A.* in bills specially to meet such acceptance.—*A.'s* firm at *Hong Kong* owed a large sum to *C.*, and were under engagement to secure the debt by depositing shipping documents with him. Being threatened by *C.* with immediate legal proceedings, they promised him that if he would forbear to take such proceedings, and would release them from their obligation to deposit shipping documents, they would deposit with him a bill of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the value thereof. The bill of lading of the goods purchased from *B.* was accordingly indorsed to *C.* who had no knowledge of the terms made with *B.*, and it

BILL OF LADING—*continued.*

was returned by *C.* according to agreement, on receipt of an equivalent sum:—*Held* (reversing the judgment of the Supreme Court of *Hong Kong*), that *C.* by such forbearance and release gave valuable consideration; that the legal interest in the goods passed by the indorsement of the bill of lading, and that *B.* could not enforce his claim against the proceeds of sale received by *C.* in respect thereof. Chartered Bank of India *v.* Henderson - - - - - 501

BREACH OF CONTRACT: *See* Contract. 4.

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CANADA, CIVIL CODE OF LOWER: *See* Appealable Amount; Colonial Law.

CANADA, LAW OF: *See* Colonial Law. 2, 4; Insurance (Marine); Mortmain; Principal.

CANADA LAW OF LOWER: *See* Power of Sale by Usufructuary.

CAPTURE, APPREHENSION OF: *See* Ship and Shipping. 2.

CARGO: *See* Ship and Shipping. 1.

CARGO, TIME OF OCCURRENCE OF LOSS OF: *See* Insurance (Marine).

CERTIORARI.] Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitution of such companies, and for regulating their proceedings, it will be assumed, in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with. — The Supreme Court of the Colony of *Victoria* has a general power to issue a writ of certiorari to any inferior Court in the Colony to bring up the proceedings of such Court, co-extensive with the like power of the Court of Queen's Bench in *England*.—The Courts of Mines, which have been created by Acts of the local Legislature of the Colony of *Victoria*, and with a jurisdiction limited both as to the persons and the matters within the Colony over which it is to be exercised, stand, in relation to the Supreme Court, on the footing of inferior Courts.—The power of the Supreme Court to issue a certiorari to the Courts of Mines in respect of any proceedings under the Mining Statute, 1865, has been taken away by statute.—An appeal may be brought by the shareholders of a mining company to the Chief Judge of the Court of Mines against an order made by a Judge of a Court of Mines for winding up a company upon such a proceeding as that prescribed by the 28th and following sections of the *Mining Companies Limited Liability Act*, 1864.—Where certiorari is said to be taken away by statute, the Superior Court is not absolutely deprived of the power to issue the writ; but its action as to the writ is controlled and limited, and it cannot quash the order removed by certiorari except upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order, or of manifest fraud in the party procuring it.—Matters on which the defect of jurisdiction depends may be apparent on the face of the proceedings, or may be brought before the Superior Court by affidavit, but they must be

CERTIORARI—*continued.*

extrinsic to the adjudication impeached.—Objections on the ground of defect of jurisdiction may be founded on the character and constitution of the inferior Court, the nature of the subject matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior Court.—The objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the Judge has erroneously found a fact which was essential to the validity of his order, but which he was competent to try.—The principle acted on in *Rex* v. *Bolton* (1 Q. B. 66), that an adjudication by a judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, recognised and followed.—The rule in *Bunbury* v. *Fuller* (9 Exch. 111) approved. —It is not incumbent on a person lending money to a joint stock company to ascertain that all the proceedings of the company and its shareholders, *inter se*, have been strictly regular.—Where a question was raised whether a fraudulent use had been made of the machinery for winding up registered companies, such question being a complicated one, dependent on a variety of circumstances capable of explanation, and requiring nice consideration:—*Held* (reversing the decision of the Supreme Court of the Colony of *Victoria*), that the order complained of ought not to have been quashed on certiorari.—*Semble*, the Court of Mines of the Colony of *Victoria* has power to review an order of its own for winding up a registered company whether made *ex parte* or not, on the suggestion that the order was fraudulently obtained.—If a party makes a fraudulent use of the process of a Mining Court, and no remedy is to be had in that Court, the parties aggrieved may obtain relief by regular suit in the Supreme or other competent Court. Colonial Bank of Australasia *v.* Willan - - - 417

CHARTERPARTY: *See* Ship and Shipping. 1, 2.

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CHILD, ILL TREATMENT OF: *See* Judicial Separation.

"CHINA, CRIMES AND OFFENCES AGAINST THE LAWS OF": *See* Extradition of Criminals.

CIVIL CODE OF LOWER CANADA: *See* Colonial Law; Appealable Amount.

CLIENT, PURCHASE FROM: *See* Purchase by Solicitor.

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COLONIAL LAW: *See also* Appealable Amount; Certiorari; Extradition of Criminals; Power of Sale by Usufructuary.

1. —— A Colonial Government having under a Colonial Act invited application for orders which should entitle the holders to receive within five years allotments of land surveyed by the Government for the purpose, *A.* obtained and paid for several such orders. Five years elapsed without any land having been allotted to *A.*

COLONIAL LAW—*continued.*

Before the expiration of the five years an Amending Act was passed, whereby holders of orders under the earlier Act were enabled, but were not required, on application within nine months, to receive certain allotments in lieu of those secured to them under the earlier Act:—*Held*, that the Government had entered into a positive contract to survey within five years; and that *A.*, on giving up the orders, was entitled to a refund of principal and interest from the time of payment. Blackmore *v.* North Australian Company 24

2. —— The rule of law in *Lower Canada*, that a debt due from the estate of a testator in respect of an alimentary allowance given by his will, is incapable of being the subject of compensation or set-off, applies even in the case where the donee of the alimentary allowance is an executor and trustee of the estate.—The law of *Lower Canada* does not recognise the distinction between law and equity which prevails in *England*.—The right to "rapport," or "return" is simply an incident to a partition.—Where a person who is indebted to an estate is entitled to receive by way of alimentary allowance an aliquot portion of the net revenue of the estate; it is erroneous to reckon, as part of such revenue, the interest due from such person on his debt. Muir *v.* Muir - 66

3. —— The *Crown Lands Occupation Act* of 1861 of the colony of *New South Wales* confers (sect. 36) on the Governor in Council power to make regulations for carrying the Act into full effect, such regulations to be published in the *Gazette* and laid before the Colonial Parliament. Such regulations may govern not only the form but the effect of instruments of transfer of those rights which precede the grant of Crown leases. —Such regulations to be valid, must relate to matters arising under the provisions of the Act, and not provided for in that Act, and must be in accordance with the provisions of the Act.—A person who has *bonâ fide* paid money without notice of any other title, may afterwards, even *pendente lite*, get a legal title if he can, and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself.—The Crown lands of the colony are held by Her Majesty for distribution according to the *Constitution Act*, and as now directed to be disposed of under the *Crown Lands Act of* 1861. Blackwood *v.* London Chartered Bank of Australia - - - - - - 92

4. —— A bank certificate was given in the following form:—"*Montréal*, 7 *Septembre*, 1863.—"*A. B. a déposé dans cette banque à intérêt à quatre pour cent par an, la somme de deux mille dollars, payable à l'ordre C. D., lors de la remise du présent certificat. Cette somme pour porter intérêt devra rester au moins trois mois dans cette banque, et le porteur de ce certificat ne pourra la retirer qu'après quinze jours d'avis, l'intérêt cessant de jour de cet avis.*"—*Quære*, whether this was a negotiable instrument under Art. 2349 of the *Civil Code of Lower Canada*.—Under the 776th Article of the *Civil Code of Lower Canada*, which provides that gifts of moveable property accompanied by delivery may be made and accepted by private writings or verbal agreements, the anterior possession of property which can be the subject of *don manuel* is equivalent to delivery at the time of the gift, although the former possession was for another purpose.—The maxim of the French law—*possession vaut titre*—held not to apply where an agent held possession of a bank deposit certificate standing in the name of his principal, and bearing the principal's indorsement, the production of which certificate was required by the bank whenever interest was paid.—The parol testimony of witnesses is admissible to prove the fact of gift in certain cases coming within the class of *dons manuels*.—In cases where formal authentication by notarial act is dispensed with, the Court will not support a gift except upon plain and conclusive evidence of the agreement to give; especially where an agent sets up a gift from his principal, and mainly relies for proof of it upon the possession of a document which may have been originally intrusted to him for the purposes of his agency. Richer *v.* Voyer [461

COMPANY: *See* Certiorari; Contract. 3.

COMPENSATION: *See* Colonial Law. 2.

COMPULSORY PILOTAGE—When the employment of a pilot is within the provisions of s. 139 of the *Mersey Docks Consolidation Act*, 1858, such employment is compulsory. The object of the master, when the vessel left the dock, was to get to sea as soon as he could, and he arranged with the pilot that the vessel should anchor in the *Mersey* for the night, but should go so far on the way as would enable her to cross the bar on the next morning's tide:—*Held*, that the ship was proceeding to sea within the meaning of s. 139 at the time she left the dock, and that the anchoring was not a discontinuance of her progress to the sea, but an act proper and reasonable to be done in the course of it.—The 138th section of the Act does not relate to the giving of extra remuneration to those pilots only who are voluntarily engaged.—It may happen that a pilot who is compulsorily engaged under the 139th section of the Act by a ship proceeding to sea, may, by the ship's detention in the river, become entitled to extra remuneration under the 138th section.—The doctrine laid down in the *The Christiana* (7 Moore's P. C. Cases, 171) and *The Lochlibo* (7 Moore's P. C. Cases, 430) concerning the relative duties of pilot and crew, recognised and approved. Wood *v.* Smith. "The City of Cambridge" - - - - - 451

CONSENT—A party to a suit, who, knowing that certain other parties are infants, agrees that a certain course should be taken in the suit, cannot afterwards object that his consent does not bind him because the other parties were infants and could not consent.—Where it is alleged that the bringing an appeal is contrary to agreement, the objection ought to be made when leave to appeal is applied for, or to be taken by a petition to the Queen before the appeal comes on for hearing. Pisani *v.* Attorney-General for Gibraltar - - - - - - 516

CONSIDERATION: *See* Bill of Lading. 2.

CONSIGNORS: *See* Bill of Lading. 1.

CONSTRUCTION OF ADMIRALTY COURT ACT OF 1861: *See* ADMIRALTY JURISDICTION.

CONSTRUCTION OF CONTRACT: *See* CONTRACT.

CONSTRUCTION OF DEED: *See* COVENANT RUNNING WITH THE LAND.

CONSTRUCTION OF DOCUMENT: *See* POWER OF SALE.

CONSTRUCTION OF NEW SOUTH WALES CUSTOMS ACT: *See* BILL OF ENTRY.

CONSTRUCTIVE NOTICE: *See* BILL OF LADING. 1.

CONTRACT: *See also* COVENANT RUNNING WITH THE LAND.

1. —— *A.* held debentures of *B.*, a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to *B.*, the rent of which lots was to be set off against the interest on the debentures. *A.* notified to *B.* that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. *B.* consented to *A's* proposal, and at the same time informed *A.* that the selected lots exceeded the value of his debentures, and that he must pay the difference. *A.* made no reply to this communication.—*A.* afterwards sued *B.* for interest on the debentures:—*Held*, that *A.* was not entitled to interest, the contract being complete, and the indication by *B.* of the difference in quantity not amounting to an introduction of a new term into the negotiation.—A correspondence between *A.* and *B.* amounted to a contract for a purchase of a future interest in immoveable property:—*Held*, that such correspondence did not require registration under the *Indian Registration Act*, 1866. PORT CANNING LAND, INVESTMENT, RECLAMATION, AND DOCK COMPANY *v.* SMITH - - 114

2. —— *A. M.*, on behalf of the firm of *M. & Co.*, merchants, in *Q.*, of which he was a member, entered into the following contract with *R. M.*:—"*R. M.* sells, and Messrs. *M. & Co.* buy, all of the spars manufactured by *R. M.*, say about 600 red pine spars, averaging by culler's measurement in *Q.*, 16 inches, at the sum of, &c., delivered free of charge in *Q.* The above spars will be out of the lot manufactured by *J. B.*, the lengths of which, according to his specification, I am satisfied with."—The lot manufactured by *J. B.* was found to consist of 603 spars, of which only 496 averaged 16 inches:—*Held*, upon the construction of the contract, that *M. & Co.* were bound to accept the 496 spars at the rate agreed on, the words, "say about 600 red pine spars," being words of expectation and estimate only, and not amounting to a warranty.—Where the declaration shews substantially a contract, and a tender in compliance with it, the Plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance. MCCONNEL *v.* MURPHY 203

3. —— *A.* having two parcels and *B.* one parcel of land, supposed to contain petroleum, it was agreed between them and *C.* that *C.* should pay them $10,000.for the land if he succeeded in forming a company for the purpose of working the oil springs, and in inducing such company to

CONTRACT—*continued.*

pay him $13,750 as the price of the land, out of which he was to keep for himself $3,750. *B.* accordingly, assuming the character of owner, gave to *C.* a conditional promise to sell all the land to him for $13,750, provided the offer was accepted within a certain time. *A.* wrote a letter, meant to be shewn to, and which was shewn to, persons intending to become members of the new company, and was proved to have influenced them, in which letter he recommended the purchase, not disclosing that he had any interest therein. *A.* and *B.* actively co-operated with *C.* throughout the whole transaction.—The company, in ignorance of the combination, accepted the proposal, but having discovered the fraud, sued for a rescission of the contract:—*Held*, that the contract must be wholly rescinded, the price repaid, and the land reconveyed.—There being a doubt (owing to the expiration of the term for which the company had been constituted) whether the company was competent to receive the money and to execute a reconveyance, the Order provided that the repayment should be made to the company, or to such other persons as were entitled in their right, on the reconveyance of the lands being made to the satisfaction of the colonial Court. LINDSAY PETROLEUM COMPANY *v.* HURD [221

4. —— Though the Supreme Court of *Gibraltar* may be bound, in administering law, to follow the principles which govern English Courts of Law, and, in administering equity, to follow the principles which govern English Courts of Equity, yet, where a suit for specific performance is commenced before it, and it is found that the Plaintiff ought not to have taken proceedings in equity, but at law, for damages in respect of a breach of contract, the Court may, amending the pleadings if necessary, continue the case as if the Plaintiff had brought an action for damages.—A *Gibraltar* firm entered into a contract with *A. B.*, of *Algeciras*, in *Spain*, in consideration of certain property having been transferred to them, to open a credit in his favour to the extent of $9400, and,to honour his drafts to that amount. After advancing him some sums of money, they refused to accept a bill for $1000 drawn upon them by him, and subsequently refused to make any further advances. Proceedings in equity were thereupon commenced by him in the Supreme Court of *Gibraltar* to enforce a specific performance of the contract, and to obtain an award of damages under the 21 & 22 Vict. c. 27, for the non-performance of the contract:—*Held* that a Court of Equity will not decree the specific performance of a mere agreement to advance money. Moreover, that that being so, it has no jurisdiction to award damages. However, the Court of *Gibraltar* might have proceeded with the case as if it had been commenced as an action at law. On its being contended that the cause of action would be merely the breach of an agreement to pay a sum of money, and that accordingly nothing could be recovered by way of damage but the principal money contracted to be paid and interest, it was *Held*, that, inasmuch as the contract was a special one, whereby the firm became bound to honour, out of moneys agreed to be placed by them to his credit, the drafts of *A. B.*,

CONTRACT—*continued.*

up to a certain amount, he was entitled to general and substantial damages for the breach of it.—On its being questioned whether the Court of *Gibraltar* had jurisdiction in the case it was—*Held*, that it had jurisdiction. Larios *v.* Gurety 346

CONTRACT TO ADVANCE MONEY: *See* Contract. 4.

CONTRACTS, LIABILITY OF SHIP FOR BREACH OF: *See* Admiralty Jurisdiction.

CONTRIBUTORY NEGLIGENCE: *See* Ship and Shipping. 3, 4.

CORPORATION: *See* Mortmain.

COUNTY COURTS, ADMIRALTY JURISDICTION OF: *See* Admiralty Jurisdiction.

COURT OF MINES OF VICTORIA: *See* Certiorari.

COVENANT RUNNING WITH THE LAND.] The owner of some land sold a part of it and entered into an agreement with the purchaser that an adjoining plot of land "should never be hereafter sold, but left for the common benefit of both parties and their successors:"—*Held*, that this was merely an agreement that the plot of land should be left open, in the state in which it then was, for the common advantage of both parties, and that such an agreement did not contravene any rule of law, but gave the person who might hold the vendee's land the right to enforce the obligation against the person who might hold the vendor's land. Thus the former might apply to a Court of Equity to order the removal of a structure that had been placed on the plot in violation of the agreement. McLean *v.* McKay - 327

CREW, DUTIES OF; *See* Compulsory Pilotage.

"CRIMES AND OFFENCES AGAINST THE LAWS OF CHINA:" *See* Extradition of Criminals.

CRIMINALS, EXTRADITION OF: *See* Extradition of Criminals.

CROWN LANDS ACT OF NEW SOUTH WALES: *See* Colonial Law. 3.

CROWN LEASES: *See* Colonial Law. 3.

CROWN, RIGHTS OF: *See* Waters.

CUSTOMS REGULATION ACT (NEW SOUTH WALES): *See* Bill of Entry.

DAMAGES FOR NON-PERFORMANCE OF CONTRACT TO ADVANCE MONEY, COURT OF EQUITY CANNOT AWARD.] Larios *v.* Gurety - - - - 346

DAUGHTER, ILL-TREATMENT OF, BY FATHER: *See* Judicial Separation.

DEBENTURES: *See* Contract. 1.

DECEIT, ACTION OF: *See* Agent.

DECISIONS APPROVED, OVERRULED, OR IMPEACHED:—1. The decision in the case of *Simpson* v. *Blues* (Law Rep. 7 C. P. 290) disapproved of. Gaudet *v.* Brown - - - 134

2. —— The case of *Western Bank of Scotland* v. *Addie* (Law Rep. 1 H. L., Sc. 145) observed on; *Barwick* v. *English Joint Stock Bank* (Law Rep. 2 Ex. 2 59) distinguished. Mackay *v.* Commercial Bank of New Brunswick - - - 394

DECISIONS APPROVED, OVERRULED, OR IMPEACHED—*continued.*

3. —— *Rex* v. *Bolton* (Law Rep. 1 Q. B. 66) recognised and followed; *Bunbury* v. *Fuller* (Law Rep. 9 Ex. 111) approved. The Colonial Bank of Australasia *v.* Willan - - - 417

4. —— *The Christiana* (7 Moore's P. C. Cases, 171) and *The Lochlibo* (7 Moore's P. C. Cases, 430) recognised and approved. Wood *v.* Smith 451

DEED, CONSTRUCTION OF: *See* Covenant running with the Land.

DEED OF GIFT: *See* Power of Sale by Usufructuary.

DELAY IN VOYAGE: *See* Ship and Shipping. 2.

DEMURRAGE: *See* Ship and Shipping. 1.

DISCOUNTS ON RENEWAL OF BILL: *See* Mortgage.

DOCUMENT, CONSTRUCTION OF: *See* Power of Sale by Usufructuary.

DUTIES OF PILOT AND CREW: *See* Compulsory Pilotage.

EASEMENT: *See* Covenant running with the Land.

ENGLISH PORT, GOODS CARRIED INTO: *See* Admiralty Jurisdiction.

EQUITABLE ARRANGEMENT, NOTICE OF: *See* Bill of Lading.

ESTOPPEL BY PLEADING: *See* Contract. 2.

EXEMPTION FROM LIABILITY UNDER MERCHANT SHIPPING ACT, 1854: *See* Compulsory Pilotage.

EXPECTANCY, WORDS OF: *See* Contract. 2.

EXTRADITION OF CRIMINALS.] It is a provision of the *Hong Kong* Ordinance, No. 2 of 1850, that, where it may appear to a magistrate or Court that there is probable cause for believing that a Chinese, who has taken refuge at *Hong Kong*, has committed "any crime or offence against the laws of *China*," he may be imprisoned with a view to his being surrendered to the Government of *China*:—*Held*, that the words "crime or offence" must be limited to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of *China*, such as murder, robbery, theft, or arson, committed by a Chinese within Chinese territory, or in Chinese ships on the high seas; piracy, moreover, in certain circumstances would come within the Ordinance, as for example if a Chinese went from the Chinese coast to plunder ships at sea, returning again to *China* with his plunder.—Where a Chinese, who had taken refuge in *Hong Kong*, was accused of having previously murdered a French captain of a French ship at sea, it was held that he could not be imprisoned and delivered up to the Chinese Government under the Ordinance; on two grounds—1. That it could not be assumed without evidence that there was any law in *China* to punish a Chinese subject for a murder committed upon a foreigner within foreign territory; and, 2. That, even if it could be so assumed, still the offence having been committed within French territory, ought to be treated as an offence against

EXTRADITION OF CRIMINALS—*continued.*

French and not as an offence against Chinese law.—Where some of a large number of Chinese coolies, who were being taken from *China* to *Peru* in a French ship, killed the captain and several of the French crew, and then took the ship back to *China*, they were held to have been guilty of piracy *jure gentium*. But the piracy was held not to be an offence against the law of *China* within the meaning of the Ordinance. If they committed an act against the municipal law of any nation, it was against that of *France;* and if they were punishable by the law of *China*, it was only because they had committed an act of piracy, which *jure gentium* is justiciable everywhere.—One of these coolies, who had taken refuge at *Hong Kong*, had been imprisoned with a view to being surrendered to the Chinese Government on the ground of his having feloniously seized the ship at sea and murdered some of the crew, and had been brought up on a writ of *habeas corpus*, and discharged by the Chief Justice of *Hong Kong*, Thereupon he was again arrested on a warrant for piracy *jure gentium*. On being brought up again on a writ of *habeas corpus*, he was again discharged by the Chief Justice, on the ground that he had been committed a second time for the same offence, contrary to the 6th section of the *Habeas Corpus Act*. On appeal it was—*Held*, by the Judicial Committee, that the first order of discharge should be upheld, but that the second order of discharge should be reversed.—The 6th section of the *Habeas Corpus Act* applies only where the second arrest is substantially for the same cause as the first, so that the return of the second writ of *habeas corpus* raises for the Court the same question with reference to the validity of the grounds of detention as the first.—The Chief Justice having been of opinion that the ship was a slave ship, and that the coolies were justified in killing the captain and crew for the purpose of obtaining their liberty; the Judicial Committee thought the evidence before him did not prove this.—Piracy defined as "robbery within the jurisdiction of the Admiralty." Attorney-General for the Colony of Hong Kong *v.* Kwok-a-Sing 179

FORFEITURE: *See* Bill of Entry.

FORMALITIES: *See* Power of Sale by Usufructuary.

FRAUD.] Fraud being established against a party, it is for him, if he allege laches in the other party, to shew when the latter acquired a knowledge of the truth and prove that he knowingly forbore to assert his right. Lindsay Petroleum Company *v.* Hurd - - 221

FRAUDULENT REPRESENTATION: *See* Agent.

FRAUDULENT USE OF POWERS OF COURT: *See* Certiorari.

FREIGHT: *See* Ship and Shipping. 1.

GIBRALTAR, JURISDICTION OF SUPREME COURT OF.] Larios *v.* Gurety - 346

GIFT, DEED OF: *See* Power of Sale by Usufructuary.

GIFT, ESSENTIALS TO: *See* Colonial Law. 4.

GOODS CARRIED INTO ENGLISH PORT: *See* Admiralty Jurisdiction. 2.

GOODS FOR SHIPMENT: *See* Admiralty Jurisdiction. 2.

GOVERNMENT RENT DUE MAY BE CHARGED TO MORTGAGE: *See* Mortgage.

HABEAS CORPUS ACT: *See* Extradition of Criminals.

HONG KONG, LAW OF: *See* Extradition of Criminals.

HUSBAND, ILL-TREATMENT OF CHILD BY: *See* Judicial Separation.

ILL-TREATMENT OF CHILD, EQUIVALENT TO ILL-TREATMENT OF PARENT: *See* Judicial Separation.

INDIAN REGISTRATION ACT, 1866: *See* Contract. 1.

INDORSEE OF BILL OF LADING, NOTICE TO: *See* Bill of Lading.

INDORSEMENT OF BILL OF LADING: *See* Bill of Lading.

INFANT: *See* Consent.

INFERIOR COURTS: *See* Certiorari.

INJUNCTION: *See* Waters.

INSTALMENTS, RENT PAYABLE BY: *See* Appealable Amount.

INSURANCE (MARINE)]: *See also* Principal.

L., an agent of *B.*, insured some goods belonging to *B.* that were being sent by ship from *Montreal* to *St. John's, Newfoundland*. The insurance company's agent issued to *L.* a "certificate of insurance," which stated that *L.* had insured the goods. It was the custom of the company to issue subsequently a policy stating that "*X. Y.*, as well in his own name as in the name of every person to whom the same shall appertain," had insured the goods. On a loss occurring, it was *Held* (reversing the decision of the Court of Queen's Bench for *Lower Canada*), that the omission in the certificate of the words "as well in his own name, &c.," did not, either by the Canadian law or by the English law, preclude *B.* from suing the insurance company in his own name.—Where goods are insured for a voyage, the time of the loss occurring is not necessarily the time when the peril is encountered and the vessel driven ashore.—A ship, with some flour as part of her cargo, was seen in the *Gulf of St. Lawrence* on the 22nd of November, 1867, and nothing more was heard of her until May, 1868, when she was found ashore at *Anticosti*, all hands having been lost. On the 29th of November, 1867, a violent storm had commenced in the Gulf, and there was strong probability that the ship was capsized and driven ashore in that gale. Part of the flour insured was subsequently saved and sold by an agent of the insurance company. The action to recover on the policy was not brought until March, 1869. The policy containing a proviso that no action should be brought on it unless within a year after the loss was incurred, the insurance company contended that the assured was too late to bring an action;—*Held*, that the loss was not in its inception total, and only became so when it was found that it was impossible to carry the flour to

INSURANCE (MARINE)—*continued.*
its destination, and that it was necessary to sell it. Consequently the assured was not precluded by lapse of time from bringing his action. Browning *v.* Provincial Insurance Company of Canada - - - - - 263

INTEREST: *See* Contract. 1; Mortgage.

INTERPRETATION OF WORDS: *See* Extradition of Criminals.

ISLE OF MAN, LAW OF: *See* Waters.

JUDICIAL SEPARATION.] Under the words "*ingiurie gravi*," in the 46th Article of the Maltese law relating to the separation of married persons, it was intended to leave a large discretion to the tribunal having to judge of the facts. Not only acts but words designed to wound the feelings of the wife may amount to "*ingiurie gravi*," and in considering whether they do so, the position of the parties and the habits and usages of the society in which they live must be regarded. Insults offered to the wife which manifest contempt of her in that character are of special gravity, especially if offered in the presence of others; and wrongs of this description are not to be estimated separately, but in combination one with another.—Where a husband habitually treated his wife with harshness and insult, and thereby kept her in a constant state of excitement and fear, and also, upon a trifling pretext, used personal violence to their adult daughter, by which her health was affected during several months:—*Held*, that the violence offered to the daughter must be taken in conjunction with the previous treatment of the mother, and that together they constituted "*ingiurie gravi*" within the meaning of the 46th Article.—Where a father ill-treated his daughter in such a manner as to afford to his wife a ground, under the Maltese law, for demanding separation from him, but the wife remained in his house for several months, during which the daughter continued to suffer from the consequences of the ill treatment, and required the attention of her mother; and the wife quitted her husband's house on the first occasion of his leaving home:—*Held*, that the matrimonial offences of the husband had not been condoned. Sant *v.* Sant 542

JURE GENTIUM: *See* Extradition of Criminals.

JURISDICTION: *See* Admiralty Jurisdiction; Certiorari; Contract. 4.

JURISDICTION OF SUPREME COURT OF GIBRALTAR.] Larios *v.* Gurety - 346

LACHES.] Fraud being established against a party, it is for him if he allege laches in the other party, to shew when the latter acquired a knowledge of the truth and prove that he knowingly forbore to assert his right. Lindsay Petroleum Company *v.* Hurd - - 221

LAND, COVENANT RUNNING WITH THE: McLean *v.* McKay - - 327

LAND ORDERS: *See* Colonial Law. 1, 3.

LIABILITY OF PRINCIPAL: *See* Agent.

LIABILITY OF SHIP FOR BREACH OF CONTRACT: *See* Admiralty Jurisdiction.

LIGHTS: *See* Ship and Shipping. 4.

LIVE STOCK, PAYMENTS ON ACCOUNT OF: *See* Mortgage.

LOSS OF CARGO, TIME OF OCCURRENCE OF, TOTAL: *See* Insurance (Marine).

LOWER CANADA, LAW OF: *See* Colonial Law. 2, 4; Power of Sale by Usufructuary; Mortmain.

MALTESE LAW: *See* Judicial Separation.

MASTER, DUTY OF, WHERE UNABLE TO LAND CARGO: *See* Ship and Shipping. 1.

MATRIMONIAL OFFENCE: *See* Judicial Separation.

MERCHANT SHIPPING ACT, 1854, s. 388. Wood *v.* Smith. The "City of Cambridge" 451

MERSEY DOCKS CONSOLIDATION ACT, 1858: *See* Compulsory Pilotage.

MINING COURTS OF VICTORIA: *See* Certiorari.

MISREPRESENTATION: *See* Agent.

MOORAGE: *See* Ship and Shipping. 5.

MORTGAGE.] *A.* gave his acceptance to *B.* for £18,700, payable (six months after date) on the 5th of February, 1867, and it was discounted by the *Bank of C.*—*A.* mortgaged a station, and also mortgaged the stock upon it to *B.* to secure the repayment of £18,700, with interest at 12½ per cent., on the day above-mentioned, and to secure the payment of any bill which the mortgagee might receive, take, make, or indorse by way of renewal or in substitution for the acceptance, or on account of all or any part of the sum therein mentioned, or on any other account incidental thereto. It was also stipulated in the mortgage of the stock that if default should be made in payment by the mortgagor of the licence fees, or rent, charges, fines, penalties, and other charges which should become payable in respect of the station or run, or the stock thereon, or in relation thereto, the mortgagee might pay it, and the run, stock, &c. should be chargeable therewith.—The bill was renewed from time to time, *B.* paying the discounts to the bank on *A.*'s behalf, and debiting *A.* with the amount in an account current rendered to *A.*, in which he charged *A.* with interest and mercantile commissions:—*Held*, that notwithstanding this mode of keeping the accounts, the amount of the advances for discounts was secured by the mortgage:—*Held*, also, that advances for payment of Government rent due and for scab licences for sheep might be charged to the mortgage, but that sheep-wash could not. Fenton *v.* Blackwood - - - 167

MORTMAIN.] A corporation, whether merely trading or not, and whether foreign or domestic, is incapacitated from acquiring as well as from holding lands in *Lower Canada* without the permission of the Crown being first obtained.—*D.* sold mining property in *Lower Canada* to *F.* In the deed the property was described as having been assigned to *D.* by "original grantees of the Crown," but it appeared that patents from the Crown had not then been obtained; moreover, by the deed *D.* expressly warranted and guaranteed *F.* against all mortgages, debts, &c. *F.* sold the

MORTMAIN—*continued.*
property to a mining company of *Boston, United States;* and from the deed it might be implied that patents had been granted. The property was subsequently granted by the Crown to some one else, who evicted the company. The company brought an action in the Court of Queen's Bench for *Lower Canada* against *B.* as being liable as *arrière-garant* (remote warrantor). The action was dismissed, and on appeal to the Privy Council the judgment was upheld:—*Held,* that, though a warranty of eviction is implied in contracts of sale, it must be inferred, from the insertion of a limited conventional warranty in the deed between *D.* and *F.*, that it was their intention to exclude the larger legal warranty. Thus, on an eviction by the assignee of the Crown, no action could be maintained by *F.* against *D.*, and consequently none by the company. Moreover, the disability of the company to acquire lands precluded them from bringing an action on the warranty. Chaudière Gold Mining Company *v.* Desbarats - - - - - 277

NEGLIGENCE, CONTRIBUTORY: *See* Ship and Shipping. 3, 4,

NEW SOUTH WALES CUSTOMS ACTS: *See* Bill of Entry.

NEW SOUTH WALES, LAW OF: *See* Bill of Entry; Colonial Law. 3.

NEGOTIABLE INSTRUMENT: *See* Bill of Lading, 1; Colonial Law. 4.

NOTICE, ASSIGNMENT WITHOUT: *See* Bill of Lading.

NOTICE TO INDORSEE OF BILL OF LADING: *See* Bill of Lading.

OMISSION IN BILL OF ENTRY: *See* Bill of Entry.

OMISSION IN BILL OF LADING: *See* Bill of Lading.

OMISSION IN POLICY OF INSURANCE: *See* Insurance (Marine).

"ORDER OR ASSIGNS:" *See* Bill of Lading.

PATENT.] The Judicial Committee will refuse to enter upon accounts in a patent case if they have not been filed as required by the 9th rule.—Two cognate patents, having different terms to run, extended so that both should expire on the same day. *In re* Johnson's and Atkinson's Patents - - - - - - 87

PAYMENTS ON ACCOUNT OF LIVE STOCK: *See* Mortgage.

PETROLEUM, CARRIAGE OF, BY SEA: *See* Ship and Shipping. 1.

PILOT: *See* Compulsory Pilotage.

PIRACY JURE GENTIUM: *See* Extradition of Criminals.

PLEADINGS: *See* Practice. 1.

POLICY: *See* Insurance (Marine).

POWER OF SALE BY USUFRUCTUARY.] The usufruct of land in *Lower Canada* was given by deed of gift to *A.* during his life, and after his death the deed gave the property in substitution to his children, with a limitation over in case he died without children; and power was given to *A.* to sell the land for a rent-charge if it should be judged by experts to be advantageous to his children:—*Held,* that such power could be exercised without the sanction of any judicial authority.—*A.* having a power of sale under the circumstances above mentioned, sold his life interest in the usufruct to *B.*, and subrogated *B.* in all his rights under the deed of gift.—*Held,* that the power to sell the land for a rent-charge, conferred on *A.* by the deed of gift, had not been extinguished by the sale to and subrogation of *B.*—A person having already power under a deed of gift to sell land, applied to a Court for authority to sell the land, which the Court granted, annexing a condition not required by the donor:—*Held,* that this part of the decree could at most be considered as directory only, and not as imposing a condition which rendered the sale void if it were not complied with.—A deed of gift conferred the usufruct of land in *Lower Canada* on *A.* during his life, and after his death gave the property in substitution to his children, with a limitation in the following terms: "*et dans le cas de mort du dit donataire sans enfants la jouissance et usufruit des biens à lui présentement donnés seront réversibles à ses frères et sœurs ou à aucun d'eux, pour par eux en jouir leur vie durante; et si au décès du dit donataire sans enfants tous ses frères et sœurs étaint décédés la propriéte des dits biens retournera et appartiendra à leurs enfants nés et à naître, pour être partagés entre aux par souches. . .*"—The donor died. The donee died without children, having survived all his brothers and sisters, three of whom died leaving children, viz., *C.*, who died before the date of gift, and *D.* and *E.* who died after that date:—*Held,* that the children of *C.* were entitled to one-third of the property comprised in the deed.—*Semble,* that by the old law of *Lower Canada,* where there is a gift of the usufruct of land for life, and a substitution with power to the usufructuary himself to sell the land, if experts deem it advantageous to the substitution; the appointment of a tutor to the substitution is not required, and if he be appointed his functions are limited to having the experts duly appointed, and it is not necessary to consult him as to the management of the sale. Leclère *v.* Beaudry - - - - 362

POWER OF SALE BY USUFRUCTUARY—*cont.*

PRACTICE: *See* Agent; Appeal.

1. —— The Privy Council will exercise its discretion in deciding a case on its merits, without regarding strictly the precise terms of the pleadings. McLean *v.* McKay - - - 327

2. —— The Judicial Committee are unwilling to send a case for re-trial, or to decide it, upon points which have been raised for the first time at their bar, and which possibly may have been treated as agreed upon, or too clear for argument, in the Court below. Mackay *v.* Commercial Bank of New Brunswick - - - 394

3. —— Reasons given by a Judge of a Court from which an appeal lies to the Privy Council ought to be stated publicly at the hearing, and communicated to the Registrar of the Privy Council. Their Lordships will not look at notes merely communicated to one of the parties. Richer *v.* Voyer - - - - 461

PRACTICE—*continued.*

4. —— Where leave to appeal has been unduly given the proper course is to come before the Privy Council before any expense has been incurred, and to apply for the dismissal of the appeal.—Such an application if delayed till the hearing will only be granted without costs, and if there be special circumstances in favour of granting special leave to appeal, and application for such leave will be entertained, but if it is granted fresh security for costs must be given. Sauvageau *v.* Gauthier - - - 494

PRECAUTIONS AGAINST STORMS: *See* Ship and Shipping. 5.

PRINCIPAL.] The rule that an undisclosed principal may sue and be sued upon mercantile contracts made by an agent in his own name, subject to any defences or equities which without notice may exist against the agent, is applicable to policies of marine insurance under the Canadian as well as under the English law. Browning *v.* Provincial Insurance Company of Canada - - 263

PROLONGATION OF TERM: *See* Patent.

PURCHASER AGREEMENT BETWEEN VENDOR AND: *See* Covenant running with the Land.

PURCHASE-MONEY, REFUND OF: *See* Colonial Law. 1.

PURCHASE BY SOLICITOR FROM CLIENT.] The Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of shewing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser. The circumstances of the employment may be considered, and the amount of influence estimated:—*Semble*, an attorney purchasing from his client ought to insist on the intervention of another professional adviser. Pisani *v.* Attorney-General for Gibraltar - 516

"RAPPORT:" *See* Colonial Law. 2.

RECONVEYANCE: *See* Contract. 3.

REDEMPTION OF RENT: *See* Appealable Amount.

REFUND OF PURCHASE-MONEY: *See* Colonial Law. 1.

REGISTRATION: *See* Contract. 1.

REGISTRATION PENDENTE LITE: *See* Colonial Law. 3.

REGULATIONS MADE UNDER A STATUTE: *See* Colonial Law. 3.

RENEWAL OF BILL: *See* Bill of Exchange; Mortgage.

RENT, REDEMPTION OF: *See* Appealable Amount.

RESCISSION OF CONTRACT: *See* Contract. 3.

"RETURN:" *See* Colonial Law. 2.

RIGHT OF UNDISCLOSED PRINCIPAL TO SUE IN HIS AGENT'S NAME.] Browning *v.* Provincial Insurance Company of Canada - - - 263

RIGHTS OF CROWN: *See* Waters.

SAILING-VESSEL, DUTY OF STEAMER APPROACHING: *See* Ship and Shipping. 4.

SALE BY USUFRUCTUARY: *See* Power of Sale.

SECRET TRUST: *See* Bill of Lading.

SHIPOWNER, DUTY OF, WHERE UNABLE TO LAND CARGO: *See* Ship and Shipping. 1.

SHIP AND SHIPPING: *See also* Bill of Entry; Bill of Lading; Insurance (Marine).

1. —— Plaintiff's ship with a general cargo sailed from *London* for *Havre* with some petroleum on board. Under the bill of lading the Plaintiff was to deliver the petroleum at *Havre*, and it was to be taken out by the Defendant within twenty-four hours after arriving at *Havre*, or ten guineas a day was to be paid for demurrage. On the ship's arriving at *Havre*, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay there. Returning to *Havre*, he discharged his general cargo, and no bill of lading having been presented to him, and no application having been made to him for the delivery of the petroleum, he brought it back to *London*. On the shipowner claiming freight, back-freight, demurrage, and expenses, it was *Held*, that he was entitled to freight, back-freight, and expenses. Freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant. And although the petroleum could not be landed at *Havre*, it was in the port a reasonable time, during which the owner might have received it; and the freight was accordingly earned.—In a case where no application for delivery is made, the captain may land and warehouse the cargo at the expense of the merchant; and where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but in the absence of advices he may take it to such a place as in his judgment is most convenient for the merchant, and may charge to the merchant all expenses properly incurred; consequently, here the shipowner was entitled to back-freight and expenses. The demurrage and the expenses incurred in the ineffectual attempt to land at the neighbouring ports were not allowed, but were looked on as part of the expenses of the voyage.—*Simpson* v. *Blues* (Law Rep. 7 C. P. 290) disapproved of. Cargo ex "Argos" - - - - 134

2. —— An apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, will justify delay in the prosecution of a voyage; and a ship is not answerable in a suit under s. 6 of the *Admiralty Court Act*, 1861, for damage to cargo caused by such delay. Anderson *v.* Owners of the "San Roman" 301

3. —— A vessel in tow during a thick fog, knowing that it was dangerous to proceed, did not order the tug to stop, and the vessel in consequence ran aground:—*Held*, in an action by the owners of the tow against the owners of the tug for damages, that the vessel in tow contributed to the accident. Smith *v.* St. Lawrence Tow-boat Company - - - - - 308

4. —— A steamship seeing a sailing-vessel at a distance of two or three miles ought not, even if the lights of the sailing-vessel are not visible, to take a course which will carry her across the bows of the sailing-vessel.—In a case of collision, even if the light of one vessel was invisible, the

SHIP AND SHIPPING—*continued.*
vessel will not on that account be held to have contributed to the collision, where the other vessel has pursued a course which of itself would suffice to produce the collision.—A manœuvre made too late to affect the collision, does not make the ship liable as having contributed to the collision, even if the manœuvre was erroneous.—Where a steamship is approaching a sailing-ship, and does not know what course the other ship is pursuing, it is her duty (whether the lights of the other vessel are visible or not) to take no decisive movement until she can ascertain it.—The law does not appoint any particular place at which the lights should be fixed, but they ought to be placed so as to be properly visible.—*Semble*, the fact that the lights of one ship are invisible to the other does not make the former ship contributory when the course pursued by the latter is not in itself prudent and judicious.—The "Bougainville" and The "James C. Stevenson." Beal *v.* Marchais - - - - 316

5. —— A vessel in port was moored to a buoy, the use of which was sanctioned by the authorities, and, a storm being expected, she also had her anchor ready to drop. The mooring buoy broke and the vessel drifted. She attempted to cast anchor, but was prevented by inevitable accident. She came into collision with another vessel which was properly moored:—*Held*, that the first vessel had not contributed by negligence to the collision. —Where the master of a ship takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, his owners are not held responsible because he may have omitted some possible precaution which the event suggests that he might have resorted to.—When the authorities of a port permit vessels to moor, take in and discharge cargo at a certain buoy, it must be assumed that they sanction the use of the buoy and treat it as a proper and sufficient mooring place. Doward *v.* Lindsay. The "William Lindsay" - 338

SOLICITOR, PURCHASE BY, FROM CLIENT: *See* Purchase by Solicitor.

SPECIAL LEAVE TO APPEAL: *See* Appeal.

SPECIFIC PERFORMANCE OF AGREEMENT TO ADVANCE MONEY. Larios *v.* Gurety 346

STATUTORY OBLIGATION: *See* Colonial Law. 1.

STEAMER, DUTY OF, APPROACHING SAILING-VESSEL: *See* Ship and Shipping. 4.

STRAITS SETTLEMENT, LAW OF: *See* Appeal.

SURETYSHIP: *See* Bill of Exchange.

TOTAL LOSS, TIME OF OCCURRENCE OF: *See* Insurance (Marine).

TRADING CORPORATION CANNOT ACQUIRE OR HOLD LANDS IN LOWER CANADA. Chaudière Gold Mining Company *v.* Desbarats - - - - 277

TREATY OF TIENTSIN: *See* Extradition of Criminals.

TUG: *See* Ship and Shipping. 3.

UNDISCLOSED PRINCIPAL, RIGHT TO SUE IN AGENT'S NAME: *See* Insurance (Marine).

USUFRUCTUARY, SALE BY: *See* Power of Sale.

VALIDITY OF CONTRACT: *See* Covenant running with the Land.

VENDOR AND PURCHASER, AGREEMENT BETWEEN: *See* Covenant running with the Land.

VESSEL IN TOW: *See* Ship and Shipping. 3.

VICTORIA, LAW OF: *See* Certiorari.

WAIVER OF APPEAL.] An information by way of bill of complaint was by consent amended by the introduction of the words "That the rights, if any, of the several Defendants may be ascertained and declared by decree of this Honourable Court, and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that this Honourable Court will give such further directions in the premises as shall be necessary." There was no stipulation that the right of appeal should be given up, and it appeared that the parties never contemplated that they were ceasing to keep the cause *in curia*, or that the Judge was to hear it otherwise than as a Judge, or that it was not to go on subject to all the incidents of a cause regularly heard in Court:—*Held*, that the right to appeal had not been waived. Pisani *v.* Attorney-General of Gibraltar - - - - - 516

WARRANTY: *See* Mortmain.

WATERS.] By an Act of *Tynwald* of the *Isle of Man* a reservation was made to the lord of the isle (now represented by the Crown), of all such mines and minerals as then were, or at any time theretofore had been, vested in the lords of the isle.—The Queen, as lady of the isle, being thus possessed of the mines as of her own original title in the soil, has the right to the use of all waters found thereon and percolating by natural processes into the mines when opened.—The holder of a mining lease from the Crown is not liable to make compensation for the withdrawal by percolation into his mine of water which would otherwise have flowed into, or having flowed into, would have been retained in the wells and springs of the superjacent land.—The Court of Chancery of the *Isle of Man* granted an injunction restraining *A.* from proceeding with his mining operations on the lands of *B.* until he should give security, in the specified form, to meet such damages as *B.* might, on the hearing of the cause, be decreed entitled to recover for injuries done, or that might be done, to *B.*'s lands. *A.* gave security accordingly, but the Court ordered the injunction to be continued till the hearing of the cause:—*Held*, that the order for injunction was not justified by the practice of the Court. Ballacorkish Silver, Lead, and Copper Mining Company *v.* Harrison - - - 49

WINDING UP OF COMPANY: *See* Certiorari.

WORDS:
"Crimes and offences against the law of *China*." Attorney-General of Hong Kong *v.* Kwok-a-Sing - - 179
"Order or assigns." Henderson *v.* Comptoir d'Escompte de Paris - - 253

WORDS OF EXPECTANCY: *See* Contract. 2.

WRONGFUL APPROPRIATION OF CHEQUE: *See* Bill of Exchange.

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